[Cite as *State v. Juntunen,* 2010-Ohio-5625.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 09AP-1108 (C.P.C. No. 08CR-1784)
v.	:	No. 09AP-1109 (C.P.C. No. 09CR-1534)
Kelly D. Juntunen,	:	
		(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on November 18, 2010

Ron O'Brien, Prosecuting Attorney, and *Sarah W. Creedon,* for appellee.

Yavitch & Palmer Co., L.P.A., and *Jeffery A. Linn, II,* for appellant.

APPEALS from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Defendant-appellant, Kelly D. Juntunen, appeals from judgments of the Franklin County Court of Common Pleas finding him guilty, pursuant to jury verdict, of one count of domestic violence and one count of assault, both misdemeanors of the first degree. Because (1) the facts of the case do not support an accident instruction; and (2)

defendant suffered no prejudice in the trial court's instructions regarding the definition of "great bodily harm" and "serious physical harm," we affirm.

I. Facts and Procedural History

{¶2} On March 12, 2008 the state indicted defendant on one count of abduction in violation of R.C. 2905.02 and one count of domestic violence in violation of R.C. 2919.25; on March 17, 2009 the state indicted defendant on one count of felonious assault in violation of R.C. 2903.11. All three charges arose out of an incident during the early morning hours of February 27, 2008 at the Dublin, Ohio home of the defendant and the victim.

{¶3} Defendant and the victim were engaged to be married, and on the evening of February 26, 2008 the couple made dinner and consumed three to four bottles of wine. Around 10:00 p.m., they started playing video games in the basement of their home; around 1:00 a.m. they began to play "Guitar Hero," a video game which simulates playing a guitar in a band. When a Pearl Jam song came up, the victim attempted to "pause" the game so defendant could play, but she experienced some difficulty. Defendant accused her of lying about not knowing how to "pause" the game. From that point, defendant's and the victim's recollection of the evening differ markedly.

{¶4} According to the victim, defendant hit her on her forehead with the toy guitar used in the game and then refused to allow her to leave the basement. When she tried to go upstairs, defendant punched her in the face. She began to move backwards, and, as defendant came toward her, she threw her wine at him. He then tackled her, smashed her

head against the floor numerous times, and told her he would kill her. Defendant eventually got up off the victim and "marched her up the stairs" to the bathroom. (Tr. 438.)

{¶5} Defendant, by contrast, denied hitting the victim with the toy guitar; he stated he simply placed the guitar against the wall. When he started to walk toward the victim, with an arm outstretched for a hug, she threw her wine glass at him, hitting him in the forehead. Blinded from the wine, defendant pushed the victim into the wall. She then jumped on defendant's back; the two fell to the ground with defendant landing on top. When defendant rolled over, the victim began striking him with a wine bottle, which he eventually forced out of her hand. Seeing the victim's face beginning to swell, he insisted she go to the hospital, and they walked upstairs to the bathroom.

{¶6} According to the victim, she began crying in the bathroom at the sight of her swollen face, so defendant gave her a bag of frozen corn to put on it. When she told defendant she wanted to go to bed, he told her to sleep in the tub; she did. Defendant subsequently entered the bathroom and opened one side of the shower doors. She tried to escape out the other side, but her foot went in the toilet, and he caught her. The two were struggling against each other near the entry way to the bathroom when the victim bit defendant's shoulder and grabbed his testicles. In response, defendant threw her into the bathroom wall, causing a hole in the drywall, and into the shower doors, causing the doors to come off their tracks.

{¶7} On returning downstairs, defendant tried to call 911, but the victim slapped the phone out of his hand; defendant decided to leave. Intending to gather his belongings, the two went upstairs and eventually ended up in the bathroom where, according to

defendant, the victim started pounding on his chest. He grabbed her wrists to make her stop, but she side-kicked his stomach, "literally bounced backwards," and hit the shower doors. (Tr. 722.) She ran at him, grabbed his testicles, and gashed his penis with her fingernail. Out of anger from the pain, defendant smashed the drywall with his elbow and hand. The victim then lunged at him and bit his shoulder; he pulled her hair to get her away from him. When she tried to bite his throat, he hit her forehead to get her off him. Sometime after that series of events, defendant left the residence and the victim called 911.

{¶8} The trial began on October 13, 2009, and at the conclusion of the trial on October 22, 2009 defendant requested an accident instruction regarding the "scratch on the back" in the bathroom. (Tr. 897.) The trial court denied the request, explaining that defendant was not entitled to an accident instruction because the court was instructing on self-defense. The court noted not only that accident and self-defense are "inconsistent and may not be raised together," but that what happened in the bathroom fell under a self-defense, not accident, instruction. (Tr. 931.)

{¶9} During deliberations, the jury asked the trial judge whether "the law defines great bodily harm for purposes of self-defense. Is it comparable to physical harm or serious physical harm. Is great worse than serious." [sic] (Tr. 1087.) Relying on *State v. Williford* (1990), 49 Ohio St.3d 247, the trial judge told the jury that the terms "great bodily harm" and "serious physical harm" meant the same thing and could be used interchangeably. Defendant objected to the instruction, stating "great bodily harm" involved a higher threshold than "serious physical harm."

{¶10} Shortly after receiving the trial court's response, the jury returned verdicts finding defendant not guilty of abduction and not guilty of felonious assault, but guilty of domestic violence and the lesser included offense of assault. During the sentencing hearing on October 29, 2009, the trial court merged the two offenses for purposes of sentencing and imposed on defendant a term of six months in the Franklin County Correctional Facility.

II. Assignments of Error

{¶11} Defendant appeals, assigning the following errors:

> ASSIGNMENT OF ERROR 1:
>
> THE TRIAL COURT ABUSED ITS DISCRETION IN FORMULATING THE JURY INSTRUCTIONS BY REFUSING TO INCLUDE AN ACCIDENT INSTRUCTION REGARDING A SPECIFIC ACT, THUS VIOLATING APPELLANT'S RIGHT TO PRESENT A FULL AND COMPLETE DEFENSE AS GUARANTEED BY THE SIXTH AND FOURTEE[N]TH AMENDMENTS TO THE UNITED STATES CONSTITUTION.
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> ASSIGNMENT OF ERROR 2:
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> THE TRIAL COURT ABUSED ITS DISCRETION BY INSTRUCTING THE JURY THAT THE TERM "GREAT BODILY HARM' MAY BE USED INTERCHANGEABLY WITH "SERIOUS PHYSICAL HARM" REGARDING A CLAIM OF SELF DEFENSE, WHICH WAS UNSUPPORTED BY LEGAL PRECEDENT AND ACTED TO CONFUSE AND MISLEAD THE JURY, DEPRIVING APPELLANT OF DUE PROCESS OF LAW AND A RIGHT TO A FAIR TRIAL AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSITUTION AND COMPARABLE PROVISIONS OF THE OHIO CONSTITUTION.

III. First Assignment of Error - Accident Instruction

{¶12} In his first assignment of error, defendant asserts the trial court committed reversible error in refusing to instruct on "accident" concerning the scratches the victim had on her back from falling into the shower doors in the bathroom.

{¶13} A court reviewing a trial court's refusal to submit to the jury a requested instruction must determine whether the trial court's decision constituted "an abuse of discretion under the facts and circumstances of the case." *State v. Wolons* (1989), 44 Ohio St.3d 64, 68, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157 (stating an " '[a]buse of discretion' connotes more than an error of law or judgment" and "implies that the court's attitude is unreasonable, arbitrary or unconscionable"). The trial court possesses the discretion "to determine whether the evidence presented at trial is sufficient to require that [the] instruction be given." *State v. Lessin* (1993), 67 Ohio St.3d 487, 494. Here, the trial court's instructions comport with defendant's evidence, as the court instructed the jury with the affirmative defense of self-defense, but refused to instruct on accident. See *State v. Barnd* (1993), 85 Ohio App.3d 254, 259 (noting a court need not instruct the jury as a party requests if "the evidence adduced at trial is legally insufficient" to support it).

{¶14} As the trial court noted, accident and self-defense generally are "inconsistent by definition." Id. at 260. Self-defense "presumes intentional, willful use of force to repel force or escape force." *State v. Champion* (1924), 109 Ohio St. 281, 286-87. Accident "is exactly the contrary, wholly unintentional and unwillful." Id. at 287. As a result, accident "involves the denial of a culpable mental state and is tantamount to the

defendant not committing an unlawful act," while a defendant claiming self-defense "concedes he had the purpose to commit the act but asserts that he was justified in his actions." *Barnd* at 260. Although a defendant generally may only receive a jury instruction on either accident or self-defense, in certain circumstances "instructions on both" are given. *State v. Orr* (Apr. 17, 1986), 8th Dist. No. 50374 (concluding "the trial court should have instructed the jury on both accident and self-defense" where, according to the defendant, "she acted in self-defense when she picked up the gun" but "the fatal shot was fired accidently during the struggle"); *State v. Howe* (July 25, 2001), 9th Dist. No. 00CA007732.

{¶15} Even if, in the abstract, a case involving an altercation that moved among various sites may support an instruction on accident for one injury and self-defense for another, the evidence here was insufficient to support defendant's request for an accident instruction. According to defendant's testimony, the victim kicked him in the stomach, "literally bounced backwards" and fell into the shower doors. (Tr. 722.) Defendant thus does not claim he unintentionally shoved the victim into the shower doors, as in *State v. Johnson,* 10th Dist. No. 08AP-652, 2009-Ohio-3383, where the defendant claimed he unintentionally pulled the trigger. Id. at ¶40 (concluding accident, not self-defense, instruction was proper where the defendant testified "that the gun accidentally went off as he struggled with" the victim); see also *Barnd* at 259 (concluding the trial court properly gave an accident, not self-defense, instruction to the jury because the defendant, who was charged with assault as a result of a bar fight, "[d]enied any intent to strike the alleged victim"). Rather, defendant contends he took no action whatsoever and the victim

caused her own injuries when she kicked defendant, causing her to fall backwards into the shower doors. Because the evidence is insufficient to support an accident instruction, the trial court did not abuse its discretion in denying defendant's request for an accident instruction.

{¶16} Moreover, in light of defendant's version of the events in the bathroom, the trial court's decision to deny an accident instruction did not prejudice defendant, as the court fully instructed the jury on the level of mental culpability needed to convict defendant. A reviewing court "must consider the effect of the omitted instruction in the context of the overall charge rather than in isolation." *Barnd* at 258. "Accident" is not an affirmative defense, but "a factual defense that denies that the accused acted with the degree of culpability or mens rea required for the offense." *State v. Vance*, 5th Dist. No. 2007-COA-035, 2008-Ohio-4763, ¶98, citing *State v. Bayes* (Dec. 29, 2000), 2d Dist. No. 00CA0032. The trial court properly instructed the jury that, to find defendant guilty of assault or domestic violence, the jury was required to find defendant knowingly caused or attempted to cause harm to the victim. In accord with standard Ohio Jury Instructions, the court also defined "knowingly" for the jury. (Jury Instructions ¶2, 5, 8; R.C. 2903.13(A); R.C. 2919.25; R.C. 2901.22(B).) By convicting defendant of assault and domestic violence, the jury necessarily found defendant acted knowingly when he caused physical harm to the victim. Accordingly, the jury could not have found, pursuant to an accident instruction, that defendant acted unintentionally or unknowingly in causing such harm.

{¶17} Because not only does the evidence not support an accident instruction to the jury, but the lack of an accident instruction did not prejudice defendant in light of the

trial court's proper instruction on the mens rea required for assault and domestic violence, defendant's first assignment of error is overruled.

IV. Second Assignment of Error - "Great Bodily Harm" & "Serious Physical Harm"

{¶18} In his second assignment of error, defendant asserts the trial court erred when it instructed the jury, in response to a question, that "great bodily harm" means the same thing as "serious physical harm." (Tr. 1094.) Defendant argues the trial judge, without legal precedent to support the change, changed the agreed upon jury instruction and prejudiced defendant by lowering the standard required for self-defense.

{¶19} When a jury during its deliberation requests "clarification of instructions previously given, a trial court has discretion to determine its response to that request." *State v. Carter* (1995), 72 Ohio St.3d 545, paragraph one of the syllabus. A trial court's response to a jury's question "when viewed in its entirety, must constitute a correct statement of the law and be consistent with or properly supplement the jury instructions that have already been given." *State v. Preston-Glenn*, 10th Dist. No. 09AP-92, 2009-Ohio-6771, ¶28. "An appellate court will only find reversible error where a jury instruction has, in effect, misled the jury." *State v. Hull*, 7th Dist. No. 04 MA 2, 2005-Ohio-1659, ¶45, citing *Sharp v. Norfolk & W. Ry. Co.* (1995), 72 Ohio St.3d 307, 312; *Carter* at 553 (stating that to reverse a conviction "based upon a trial court's response to such a request requires a showing that the trial court abused its discretion").

{¶20} The jury asked the trial judge to define "great bodily harm" for purposes of self-defense, whether "great bodily harm" was comparable to "serious physical harm" and whether "great" was worse than "serious." (Tr. 1087.) The trial judge noted the confusion

arose because self-defense and the element of "great bodily harm" that accompanies it are common law concepts, while R.C. 2901.01(A)(5) defines "serious physical harm." See *State v. Jeffers*, 11th Dist. No. 2007-L-011, 2008-Ohio-1894, ¶81 (noting no statute defines "great bodily harm").

{¶21} Self-defense in Ohio takes two different forms. One concerns the use of non-deadly force and the other involves the use of deadly force. While the elements of the two correspond in some respects, they differ in ways relevant to defendant's argument. To prove self-defense involving non-deadly force, a defendant must prove, in part, the defendant had reasonable grounds to believe and an honest belief, even if mistaken, that he or she was in imminent danger of bodily harm, and the only means of protection from the danger was using force not likely to cause death or great bodily harm. 4 Ohio Jury Instructions (2006), Section 411.33; *State v. Griffin*, 2d Dist. No. 20681, 2005-Ohio-3698, ¶18. By contrast, to prove self-defense concerning deadly force, a defendant must prove the defendant reasonably believed he or she was in imminent danger of death or great bodily harm and the only means of escape from the danger was the use of force. 4 Ohio Jury Instructions (2006), Section 411.31; *Griffin* at ¶18. Under either definition, defendant must "not use more force than is reasonably necessary to defend against the attack." *Jeffers* at ¶54, citing *State v. Vera*, 8th Dist. No. 79367, 2002-Ohio-974. Given the evidence here, the judge instructed the jury on self-defense involving non-deadly force, raised as a defense to the assault and domestic violence charges.

{¶22} In instructing the jury that "great bodily harm" and "serious physical harm" meant the same thing, the judge relied on language in *Williford*, supra, where the

Supreme Court of Ohio determined whether a trial court erred concerning an instruction on deadly-force defense of a family member. Deadly-force defense of a family member involves the same concept as self-defense, except that a family member rather than the actor, is the object of defense efforts. Id. at 249-50. In addressing the issue, the court stated a defendant must believe "a family member is in imminent danger of death or *serious bodily harm*" before the defendant is entitled to use force in the family member's defense. (Emphasis added.) Id. at paragraph one of the syllabus. In the body of the opinion, the court stated the defendant must have had a "bona fide belief that [the family member] was in imminent danger of death or *great bodily harm*." (Emphasis added.) Id. at 249. The court later quoted from the court of appeals, stating the defendant must believe "his wife and family were in imminent danger of death or *serious bodily harm*." (Emphasis added.) Id. at 250. Because the Supreme Court appeared to use the terms interchangeably, the trial court instructed the jury it likewise could do so.

{¶23} Defendant argues the trial court misapplied *Williford*, as that case dealt with self-defense involving deadly force while the present case deals with self-defense concerning non-deadly force. Both versions of self-defense, however, use the term "great bodily harm": self-defense involving deadly force uses the term to describe the level of harm the defendant must perceive before he or she is justified in using deadly force, while self-defense with non-deadly force uses the term to describe the level of force a defendant may not apply. In both contexts the term connotes a high degree of bodily harm, and the trial court here appropriately conveyed to the jury the use of the two terms on the facts presented.

{¶24} Defendant, however, also notes *Jeffers*, supra, where the Eleventh District advised trial courts, when giving an instruction outside those contained in the standard Ohio Jury Instructions, to act with caution so as to ensure the instruction is a correct statement of applicable law. *Jeffers* considered the advice particularly apt were the trial court to elect to use language from an appellate court's opinion, as such language is not intended to be used as a jury instruction. Id. at ¶49. Here, the trial court did not indiscriminately pull language from an appellate decision, but used language from a Supreme Court of Ohio opinion that addressed jury instructions regarding self-defense.

{¶25} Defendant also relies on *Jeffers* to argue he suffered prejudice at the trial court's instruction, as the court in effect lowered the standard required for self-defense. In *Jeffers*, the court concluded the trial court abused its discretion when it used the term "resulting harm" instead of "serious physical harm" in a felonious assault instruction, as it lowered the standard necessary for a felonious assault conviction. Id. at ¶46; see also *Columbus v. Dawson* (1986), 33 Ohio App.3d 141, 142 (concluding the trial court committed reversible error and lowered the threshold of necessary evidence when it instructed the jury, in a case involving self-defense with non-deadly force, that the defendant was justified in using some force in self-defense "if the force used was not likely to cause great bodily harm or bodily harm" when the trial court should have instructed the defendant could use force "not likely to cause death or great bodily harm").

{¶26} Defendant, however, does not explain how, if the jury applied the terms interchangeably, using force not likely to cause "serious physical harm" lowers the standard for self-defense in any appreciable way from the common law term, "great bodily

harm." Indeed, contrary to defendant's argument, two appellate court cases have approvingly noted that great bodily harm equates to serious physical harm in the context of non-deadly force self-defense. See *State v. Hera*, 6th Dist. No. OT-05-039, 2006-Ohio-3053, ¶53 (concluding the trial court did not abuse its discretion in instructing the jury that "great bodily harm" and "serious physical harm" meant "the same thing"); *Jeffers* at ¶81 (determining that "[i]f the terms 'serious physical harm' and 'great bodily harm' do not have identical definitions, their definitions are substantially similar"). Because the terms are substantially similar, the trial judge did not abuse its discretion in its response to the jury's inquiry. Defendant's second assignment of error is overruled.

{¶27} Having overruled defendant's two assignments of error, we affirm the judgments of the Franklin County Court of Common Pleas.

Judgments affirmed.

TYACK, P.J., and BROWN, J., concur.

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