

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2009-08-208
 :
 - vs - : OPINION
 : 5/3/2010
 :
 RICHARD DWAYNE CAMPBELL, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2009-02-0285

Robin N. Piper III, Butler County Prosecuting Attorney, Lina N. Alkamaha, Government Services Center, 315 High Street, 11th Fl., Hamilton, Ohio 45011, for plaintiff-appellee

Repper, Pagan, Cook, Ltd., John H. Forg III, 1501 First Avenue, Middletown, Ohio 45011, for defendant-appellant

RINGLAND, J.

{¶1} Defendant-appellant, Richard Campbell, appeals his convictions in the Butler County Court of Common Pleas for one count of domestic violence and one count of assault. We affirm the convictions.

{¶2} Campbell, and his wife, Billie Campbell, had been married since 2003. On the night of February 7, 2009, the two began an argument that eventually turned violent. According to Billie's testimony, she told Campbell that she wanted to go with her friend, Dawn Johnson, to a local bar for a game of pool. Campbell told Billie that he would not

watch Billie's two children, who were seven and nine at the time of the incident. Instead, Johnson came over to the Campbell residence where she and Billie visited, hoping their decision to stay at the house would alleviate Campbell's anger over Billie's request to go to the bar with Johnson.

{¶3} Campbell was unhappy with Johnson's presence in the home, and told Billie that Johnson "caused trouble" between them. At some point, Campbell left the house and returned later and Billie noticed that he was staggering, slurring his speech, and exhibiting signs of anger. Billie and Campbell started arguing when Billie's son told her that his wallet and money were missing, and Billie asked Campbell if he used the money to purchase alcohol. Once Billie's son accused Campbell of taking his wallet, Campbell began yelling at the child and walked aggressively toward him until Billie placed herself between her son and Campbell. When Campbell again walked aggressively towards Billie's son, she called the police.

{¶4} Billie claimed that while she was on the phone with the police, Campbell pushed her into the wall where she hit a basket by the door through which Campbell was leaving. Once Campbell left, the police arrived and told Billie to not let Campbell back into the house and to call should she feel threatened by his presence.

{¶5} Billie and Johnson locked the doors and secured the windows, but Campbell broke through the back door approximately 30-45 minutes after the police left. Campbell rushed through the house, "dove on top" of Johnson where she was sitting on the couch, and began hitting her in the head. When Billie tried to pull Campbell off Johnson, he grabbed her by her arms and threw her into a glass coffee table next to the couch. After Billie fell through the glass table, Campbell pinned Johnson against the couch and continued to hit her head with closed fists.

{¶6} When Billie's son heard the commotion, he ran towards the fight, jerked on

Campbell's shirt and leg, and asked Campbell to stop hitting Johnson. Billie testified that Campbell kicked her son off him, and that she then threw her phone to her son and he called 911. Once Campbell heard Billie's son announce that the police were on the phone, he stopped hitting Johnson and ran out of the house.

{¶7} After the police came, took Billie's statement, and left, Johnson tried to leave but discovered her tires had been slashed. When a tow truck arrived to move Billie's truck, Billie and Johnson went outside and saw Campbell standing in the alley by Billie's home. As the women called the police again, Campbell ran away and another of Billie's friends followed him to a local convenience store where Campbell was eventually arrested.

{¶8} Campbell was later indicted on three counts of domestic violence and one count of assault. Count One charged Campbell with domestic violence for pushing Billie into the wall while she was on the phone with police. The second domestic violence count charged Campbell with throwing Billie through the glass table, while the fourth count charged him with kicking Billie's son. Count Three, the sole assault charge, was specific to Campbell beating Johnson. After a two-day trial, a jury acquitted Campbell of Counts One and Four, but found him guilty on Counts Two and Three, and further found that he had been convicted of a prior domestic violence offense. The trial court sentenced Campbell to 15 months on the domestic violence conviction and six months on the assault conviction, to be served concurrent with Count Two. Campbell now appeals his convictions and sentence, raising a single assignment of error.

{¶9} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY INSTRUCTING THE JURY THAT IT COULD CONVICT CAMPBELL UNDER COUNT TWO OF THE INDICTMENT ON THE BASIS OF CONDUCT NOT CHARGED IN THE INDICTMENT."

{¶10} In his sole assignment of error, Campbell asserts that the trial court's jury instruction on Count Two allowed the jury to convict him of a crime not charged in the indictment. This argument lacks merit.

{¶11} In his proposed jury instructions, Campbell included factual contexts for each of the three domestic violence charges, specific to the actions Campbell took against Billie and her son. The trial court declined to include facts in the instructions and instead mirrored the indictment and bill of particulars' general language charging Campbell with domestic violence in violation of R.C. 2919.25(A). Campbell now argues that the trial court's instructions were erroneous because by not specifying what facts constituted Count Two, the jury was permitted to consider acts outside the scope of the bill of particulars and indictment. According to his argument, there is no way of knowing whether the jury convicted Campbell of the domestic violence charge in Count Two based on pushing Billie into the coffee table, or if the guilty finding was based on some other act of violence outside the scope of the charge in Count Two.

{¶12} "In reviewing a trial court's decision on jury instructions, an appellate court's role is to ascertain whether the trial court abused its discretion in refusing to give a proposed instruction and, if so, whether that refusal was prejudicial. The court possesses the discretion to use its own language to communicate the same principles in language it deems proper." *State v. McLavin*, Fayette App. No. CA2006-11-044, 2007-Ohio-5633, ¶17. (Internal citations omitted.)

{¶13} Further, "a reviewing court may not reverse a conviction in a criminal case due to jury instructions unless 'it is clear that the jury instructions constituted prejudicial error.' In order to determine whether an erroneous jury instruction was prejudicial, a reviewing court must examine the jury instructions as a whole. A jury instruction constitutes prejudicial error where it results in a manifest miscarriage of justice." *State*

v. Brown, Clinton App. No. CA2008-12-049, 2009-Ohio-3933, ¶6.

{¶14} The jury instructions in this case were neither incorrectly given, nor created prejudicial error that resulted in a manifest miscarriage of justice. Instead, the language in Campbell's indictment for Count Two was repeated in his bill of particulars, and further used in the jury instructions.

{¶15} According to Count Two of the indictment, "on or about February 8, 2009 at Butler County, Ohio, Richard Dwayne Campbell did knowingly cause or attempt to cause physical harm to a family or household member, when the offender previously has pleaded guilty to or been convicted of domestic violence ***." The state later provided a bill of particulars, which contained the exact same language under Count Two as was used in Campbell's indictment.¹

{¶16} Tracking the indictment and bill of particulars, the instructions for Count Two informed the jury that "in count two of the indictment, the defendant, Richard Campbell, is charged with domestic violence. Before you can find Richard Campbell guilty, you must find beyond a reasonable doubt that on or about February 8, 2009, and in Butler County, Ohio, the defendant knowingly caused or attempted to cause physical harm to, Billie Campbell, a family member or household member."

{¶17} Therefore, the same reference to and language explaining the charge is carried through from the indictment and bill of particulars, to the jury instructions, so that the instructions were properly given. See *Brown*, 2009-Ohio-3933 (affirming appellant's conviction where the trial court's jury instruction essentially mirrored the language found in the indictment and the bill of particulars, and therefore did not expand upon the charges contained therein).

{¶18} Before the instructions were submitted to the jury, the trial court addressed Campbell's request that the jury be instructed as to what facts constituted each count, and that the mens rea for each act was knowingly. Specifically, Campbell requested the following instruction for Count Two: "'Knowingly' means that a person is aware of the existence of the facts and that his acts will probably cause a certain result. Since you cannot look into the mind of another, knowledge is determined from all of the facts and circumstances in evidence. You will determine from these facts and circumstances whether there existed at the time in the mind of the defendant an awareness of the probability that he would cause physical harm to Billie Campbell by throwing her into a glass coffee table."

{¶19} While the instruction ultimately given did not include reference to the glass table, the definition of "knowingly"² in the instructions was substantially similar to that requested by Campbell. See *State v. Velves* (Aug. 19, 1996), Stark App. No. 1995CA00366, *3 (affirming appellant's conviction where jury instructions were "substantially similar to that proposed by appellant"). Taken in consideration with the legal principle that a trial court may use its own language to communicate the legal principle at issue, the substantially similar instruction was valid even though it lacked a factual context specific to what each count entailed. While Campbell now claims that the trial court's refusal to include a factual context prejudiced him, we disagree.

{¶20} In response to Campbell's request that the instructions chronicle the facts, the trial court responded, "the only thing I will tell you is that you are specific as to the

1. The state also provided a factual introduction at the beginning of the bill of particulars in which it referenced Count Two by stating that Campbell "returned to the home and assaulted his wife a second time, throwing her into a glass coffee table (Ct. 2)."

2. According to the jury instructions, "knowingly means that a person is aware of the existence of the facts and his acts will probably cause a certain result or be of a certain nature. Since you cannot look into the mind of another, knowledge is determined from all the facts and circumstances in evidence. You will determine from these facts and circumstances whether there existed at the time in the mind of the

physical harm, which was shoving Ms. Campbell into the wall as to Count 1. Count 2 by throwing her into a glass coffee table. And Count 3, [Billie's son], kicking him in the side.

I think that the jury could find that there are other acts in this case which would constitute domestic violence as to these incidents." The trial court also stated that "the jury could make a finding that, you know, that there are other acts which would constitute domestic violence in this case as far as the three separate incidents."

{¶21} While Campbell now argues that the trial court's explanation demonstrates its intent to change the indictment to include other acts of domestic violence not listed in the indictment, a review of the record indicates otherwise. Instead, the trial court's statement had no impact on the jury's understanding of what the counts entailed or even that any of Campbell's actions that night, other than the table incident, could have been considered in Count Two. Initially, we note that the trial court's statement, and all discussions regarding instructions, occurred outside the presence of the jury so that it was never made aware of the trial court's suggestion that any of Campbell's actions that night may have constituted Count Two besides throwing Billie through the table. More significantly, all references to Count Two heard by the jury throughout the trial were specific to Campbell throwing Billie through the table.

{¶22} During opening statements, the state detailed each count and stated, "In Count 2, the state will prove to you that the defendant knowingly caused or attempted to cause physical harm, again to his wife, Billie Campbell, when he threw her into the coffee table causing the table to break."

{¶23} Further, during closing arguments, the state reviewed each count and stated specific to Count Two, "I submit to you that the defendants [sic] actions were

defendant an awareness of the probability that the defendant caused or attempted to cause physical harm to another."

knowing when he threw Billie Campbell into the coffee table when he caused it to break.

*** I also submit to you that at the time the defendant was aware of the probably [sic] that by throwing Billie Campbell into the coffee table, he would cause physical harm or that Billie would suffer physical harm."

{¶24} During Campbell's closing arguments, defense counsel stated, "ladies and gentlemen, you're here to determine if my client committed four separate crimes. Each of the four crimes having specific elements on or about February 7th of this year." Counsel then raised the issue of reasonable doubt, and went through the three counts of domestic violence. "Two, Billie Campbell miraculously landed on top of the coffee table and shattered it, a glass top coffee table, walked away without a cut on her body. You didn't hear any testimony about any cuts, even though she apparently landed, as she testified, on this coffee table and shattered it."

{¶25} From these excerpts, it is clear that the jury understood what each count entailed and convicted Campbell of Count Two because it found that his act of throwing Billie through the glass table constituted domestic violence as charged in the indictment, bill of particulars, and as explained in the jury instructions.

{¶26} Further, the jury verdict also demonstrates that it understood that the counts were specific to Campbell's distinct actions. While it acquitted Campbell for allegedly shoving Billie into the wall and kicking Billie's son, it found him guilty of throwing Billie into the table and assaulting Johnson. Both of these convictions are well supported by the evidence. Specific to Count Two, the state presented evidence that Campbell threw Billie through the table when she tried to stop him from hitting Johnson. Johnson also testified that while Campbell was hitting her, she saw Billie standing, Johnson stopped hitting her for a moment, and then she saw Billie getting up from the coffee table. The women's testimony was also corroborated by testimony from a police

officer who testified that he came into Billie's house multiple times during the night in response to the several phone calls made. The first time he entered the home, the table was intact, whereas it was shattered after police responded to the phone call made by Billie's son.

{¶27} After reviewing the trial court's decision to instruct the jury as it did, we find no abuse of discretion in refusing to give Campbell's proposed instruction. Because the instruction followed the language of the indictment and bill of particulars, and given the parties' treatment of Count Two throughout trial, the instruction was neither erroneous nor prejudicial in any way. While Campbell's instruction may have set forth the factual context of Count Two, the trial court possesses the discretion to use its own language to communicate the same principles in language it deems proper, and did so by using the language found in the indictment and bill of particulars.

{¶28} After viewing the instructions as a whole, and finding no abuse of discretion, Campbell's assignment of error is overruled.

{¶29} Judgment affirmed.

BRESSLER, P.J., and HENDRICKSON, J., concur.