[Cite as *State v. Jordan*, 2009-Ohio-6152.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-L-006**
- vs -	:	
OSHAY LOPAT JORDAN,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 08 CR 000271.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Teri R. Daniel*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

R. Paul LaPlante, Lake County Public Defender, and *Vanessa R. Clapp*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

MARY JANE TRAPP, P.J.

{¶1} Oshay Lopat Jordan appeals from the trial court's judgment, which denied his motion for a new trial and sentenced him for felonious assault and possession of crack cocaine. Mr. Jordan contends that the trial court abused its discretion in failing to give his proposed jury instruction on self-defense and a character instruction on the victim's propensity for violence. He further argues that the failure to give his proposed jury instructions resulted in such prejudicial error that a new trial is warranted. Finally,

he asserts that the jury's verdict is not supported by the manifest weight of the evidence.

{¶2} Our review of the proposed jury instructions and the evidence reveals otherwise. Thus, we determine that the trial court neither abused its discretion nor erred in denying Mr. Jordan's motion for a new trial.

{¶3} The standard jury instructions given did not eliminate any element of self-defense, except for the duty to retreat, which was not applicable in this case; and further, contrary to Mr. Jordan's contentions, the instructions given were clear that "words alone do not justify the use of deadly force or force." Thus, the jury was aware that in order to avail himself of the defense of self-defense, he must not have been the first aggressor, no matter what provoking words the victim may have spoken.

{¶4} Nor did the trial court err in refusing to give a character instruction on the victim's propensity for violence. The jury was instructed on witness credibility, and heard testimony from several witnesses as to the victim, Mr. Cleophus Wynne's, violent propensities, including Mr. Jordan and from Mr. Wynne himself regarding his past convictions for violent offenses. Further, defense counsel was given the opportunity to discuss Mr. Wynne's violent character during closing argument.

{¶5} Thus, we find Mr. Jordan's assignments of error are without merit and affirm.

{¶6} **Substantive and Procedural Facts**

{¶7} On the night of March 2, 2008, Mr. Wynne, Mr. Jordan's nephew, came over to Mr. Jordan's home for a night of "playing cards and shooting dice," or, more precisely, as Mr. Jordan admitted, a night of drinking and smoking crack cocaine. It

also appears from the testimony that Mr. Wynne went to Mr. Jordan's home to speak with him about an argument Mr. Jordan had with his wife, Joyce Jordan, which caused her to take their children and spend the night at her mother's.

{¶8} Mrs. Jordan stopped at the home somewhere between 5:00 p.m. and 7:00 p.m., staying only for a brief time. Shortly thereafter, Mr. Wynne went to use the bathroom. When he came out, Mr. Jordan asked him if he took the $60 that was in the bathroom. Mr. Jordan and Mr. Wynne dispute much of what took place next, but it is clear that at around 4:00 a.m., Mr. Jordan asked Mr. Wynne to leave as it was getting late. Mr. Wynne did not want to leave and a fight ensued, either over the money, Mr. Jordan refusing to give Mr. Wynne more crack cocaine, or simply because Mr. Jordan wanted him to leave.

{¶9} According to Mr. Jordan, Mr. Wynne came up from behind and "sucker punched" him in the eye, and then began beating his head on the foyer stairs leading up to the kitchen. At some point during the altercation, Mr. Jordan ordered his dog, Spike, to attack Mr. Wynne. The dog did not do so. The men stumbled into the kitchen, with Mr. Wynne's arm wrapped around Mr. Jordan's neck. Mr. Jordan claimed to be in fear for his life, grabbed a knife, and tried to cut Mr. Wynne's arm so that he would let go. Spike apparently interjected himself between the two men and Mr. Jordan inadvertently sliced the dog's neck. Mr. Wynne was ultimately stabbed three times in his left bicep, one so deep that it severed a major artery.

{¶10} Mr. Wynne became a hostile state witness at trial. His version of the events of the evening differed. He claimed that he barely knew Mr. Jordan. He was attempting to come back into the house after Mr. Jordan kicked him out to get his coat,

which had his car keys in the pocket. Mr. Wynne did not recall any animosity or grudges between them, or physically striking Mr. Jordan. He only recalled that he was stabbed. He also testified that he had three felony convictions, one for trafficking in cocaine and two for domestic violence.

{¶11} Mr. Wynne stumbled outside, and then lay down next to his car, where he asked Mr. Jordan to take him to the hospital. Mr. Jordan refused, saying he could not trust Mr. Wynne not to hurt him, and called 911. Mr. Jordan told the operator there had been a dispute over money and a stabbing, and requested emergency assistance.

{¶12} Mr. Jordan told the police he had stabbed Mr. Wynne in self-defense, and was arrested and taken to the Painesville police station. Mr. Wynne was taken to the Lake East Hospital and then later life-flighted to Metro Hospital due to the extreme blood loss from the severed artery.

{¶13} Mrs. Jordan and her friend, Kelly Horvath, visited Mr. Wynne at the hospital before he was life-flighted. They both testified he had, in some form or another, stated that he hurt Mr. Jordan and "won the fight." Mrs. Jordan further testified that Mr. Wynne and Mr. Jordan have never gotten along due to Mr. Wynne's hostile attitude, and that Mr. Wynne could be extremely violent. Both Mr. and Mrs. Jordan testified that during one visit in the past they needed to call the police to escort Mr. Wynne from their home because he would not leave and they were afraid he would become violent.

{¶14} When the police arrived on the scene, they found massive amounts of blood pooled around Mr. Wynne, the driveway leading up to the house, as well as the interior of the home, including the foyer, the kitchen, and dining area. Spike, also

covered in blood, refused to let the officers upstairs, and the Humane Society was called to deal with Spike's injuries and remove him from the premises.

{¶15} By that time, a search warrant was obtained, and acting on information provided by Mr. Jordan, the police searched the second floor. The search produced approximately three and a half grams of crack cocaine, a digital scale with coke residue, as well as the lid of the scale, also with coke residue, in Mr. Jordan's dresser drawer, along with a small amount of marijuana and Mr. Jordan's photo identification.

{¶16} Mr. Jordan informed the officers that he had taken marijuana from Mr. Wynne's shoe and hid it upstairs in a laundry basket. The officers found marijuana only in his dresser. Instead, the search of the laundry basket produced a small scale that is typically used to weigh drugs, as well as a baggie of crack cocaine that was located between the laundry basket and the wall. Mr. Jordan later admitted that he initially told the 911 operator and the officers the dispute arose over the missing $60 because he did not want to reveal he had been using drugs due to his active probation for a recent domestic violence conviction.

{¶17} Mr. Jordan was indicted by a grand jury on one count of attempted murder, two counts of felonious assault, and possession of cocaine. After a two-day jury trial, the jury returned a not guilty verdict on the count of attempted murder, and on one of the counts of felonious assault. He was found guilty of the remaining two counts: felonious assault, a second degree felony in violation of R.C. 2903.11(A)(2), and possession of cocaine, a fourth degree felony in violation of R.C. 2925.11. The court deferred the matter for sentencing, and, in the interim, Mr. Jordan filed a motion for new trial.

{¶18} In his motion for a new trial, Mr. Jordan argued the court committed prejudicial error because it failed to give his proposed jury instruction for self-defense and a character instruction on Mr. Wynne's propensity for violence. Mr. Jordan asserted that the jury was confused by the court's instructions of law. To support his claim he attached the affidavits of four jurors who, after reading Mr. Jordan's proposed instructions, averred their verdict would have been not guilty.

{¶19} During the sentencing hearing, Mr. Jordan's motion for a new trial was denied, and he was then sentenced to serve four years on the count of felonious assault and a concurrent, eighteen-month sentence on the count of possession of cocaine.

{¶20} Mr. Jordan timely appeals, raising the following assignments of error for our review:

{¶21} "[1.] The trial court erred when it refused to submit the defendant-appellant's proposed jury instructions in violation of the defendant-appellant's rights to due process and fair trial as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and sections 10 and 16, Article I of the Ohio Constitution.

{¶22} "[2.] The trial court erred when it denied defendant-appellant's motion for a new trial on the basis of improper jury instructions.

{¶23} "[3.] The trial court erred to the prejudice of the defendant-appellant when it returned a verdict of guilty against the manifest weight of the evidence."

{¶24} **Proposed Jury Instructions**

{¶25} Mr. Jordan contends in his first assignment of error that the trial court abused its discretion in failing to give his proposed instructions on self-defense and in determining that there was no need for a specific character instruction on the victim's

propensity for violence. In his second assignment of error, Mr. Jordan presents the same arguments in support of his argument that the trial court committed prejudicial error in denying his motion for a new trial.

{¶26} Our review of the record reveals the court gave the standard instruction of self-defense, which was a correct and unambiguous statement of the law. In any case, the court's instruction included the concepts offered by Mr. Jordan's proposed instructions, albeit they did not employ his exact wording.

{¶27} As to the character instruction on Mr. Wynne's propensity for violence, the jury was instructed as to the weight of the evidence and credibility of witnesses, heard testimony from Mr. Jordan and his wife regarding Mr. Wynne's propensity for violence, including a specific instance where they feared for their safety in the past; as well as Mr. Wynne's testimony in regard to his own history for drug trafficking and domestic violence. Furthermore, counsel was given the opportunity to argue the nature of Mr. Wynne's character during closing arguments.

{¶28} As there were no inaccurate statements of the law, we cannot say the trial court erred in failing to instruct the jury on Mr. Jordan's proposed instructions, preferring instead to use the standard instructions found in the Ohio Jury Instructions, or "OJI." Thus, both Mr. Jordan's first assignment of error and, necessarily, his second, are without merit.

{¶29} **Standard of Review**

{¶30} "An appellate court is to review a trial court's decision regarding a jury instruction to determine whether the trial court abused its discretion." *State v. Kidd*, 11th Dist. No. 2006-P-0087, 2007-Ohio-6562, ¶42, quoting *State v. Mitchell Jr.*, 11th

Dist. No. 2001-L-042, 2003-Ohio-190, ¶10, citing *State v. Wolons* (1982), 44 Ohio St.3d 64, 68.

{¶31} Furthermore, we also address the trial court's denial of Mr. Jordan's motion for a new trial for an abuse of discretion. As the Supreme Court of Ohio stated in *State v. Schiebel* (1990), 55 Ohio St.3d 71, paragraph one of the syllabus, "a motion for new trial pursuant to Crim.R. 33(B) is addressed to the sound discretion of the trial court, and will not be disturbed on appeal absent an abuse of discretion." *State v. Vinson, Jr.*, 11th Dist. No. 2006-L-238, 2007-Ohio-5199, ¶70, see, also, *In re Sechler* (Aug. 29, 1997), 11th Dist. No. 96-T-5575, 1997 Ohio App. LEXIS 3886, 18.

{¶32} "Requested jury instructions should be given if they are (1) correct statements of the applicable law, (2) relevant to the facts of the case, and (3) not included in the general charge to the jury." *Kidd* at ¶42, quoting *Mitchell*, citing *State v. DeRose*, 11th Dist. No. 2000-L-076, 2002-Ohio-4357, ¶33, quoting *State v. Edwards*, 11th Dist. No. 2001-L-005, 2002-Ohio-3359, ¶20.

{¶33} **Self-Defense**

{¶34} Mr. Jordan argues the trial court's failure to give his proposed instruction on self-defense misled the jury because the court did not explicitly instruct the jury that the events of the night and provocative words exchanged between the two men are not enough to justify Mr. Wynne starting the physical altercation. Thus, he argues it was not clear to the jury that the fact that both men were engaged in criminal activity, and the fact that Mr. Jordan accused Mr. Wynne of stealing $60, did not negate the affirmative defense of self-defense.

{¶35} Mr. Jordan's contention is without merit. Quite simply, Mr. Jordan never established that the standard OJI instruction did not contain all the necessary elements of self-defense. He further failed to establish that his proposed jury instruction was not only a correct statement of the law but that it was somehow different in a relevant and necessary way. Indeed, a review of the transcript reveals that the court gave substantial consideration to the proposed jury instructions as compared to the standard OJI instructions before it decided to use the standard OJI instructions.

{¶36} Ultimately, the court gave the standard OJI instructions because those instructions encompassed Mr. Jordan's proposed instructions and did not omit any necessary elements. Thus, the court, in relevant part, instructed the jury that "[w]ords alone do not justify the use of deadly force or the use of force. Resort to such force is not justified by abusive language, verbal threats, or other words, no matter how provocative."

{¶37} The court further instructed the jury on self-defense that "[i]n deciding whether the defendant, Oshay Lopat Jordan, had reasonable grounds to believe and an honest belief that he was in imminent or immediate danger of death or great bodily harm, you must put yourself in the position of the defendant, Oshay Lopat Jordan, with his characteristics, and his knowledge or lack of knowledge, and under the circumstances and conditions that surrounded him at the time. You must consider the conduct of Cleophus Wynne and decide if his acts and words caused the defendant, Oshay Lopat Jordan, reasonably and honestly to believe that he was about to be killed or receive great bodily harm or receive bodily harm."

{¶38} Thus, the jury was instructed that words alone are not enough to justify the use of force, and that in order to justify his actions, Mr. Wynne must have physically acted in such a way that Mr. Jordan had a reasonable belief he was in imminent danger of great bodily harm.

{¶39} There is, quite simply, nothing misleading about the jury's instructions as to self-defense. Just because the court chose, after much discussion with counsel in chambers prior to giving the instructions, to give the standard instruction does not establish that the standard instruction lacked a necessary element. There was testimony in the record that Mr. Jordan initiated the altercation when he physically put his hands on Mr. Wynne's shoulders and attempted to shove him toward the door. Thus, it is obvious that the jury chose to believe the state's evidence was more credible in deciding that Mr. Jordan was the first aggressor.

{¶40} As noted in the concurring opinion in the case of *State v. Jeffers*, 11th Dist. No. 2007-L-011, 2008-Ohio-1894, "[t]he standard instructions found in Ohio Jury Instructions, commonly referred to as OJI, are not mandatory. Rather, they are recommended instructions, based primarily upon case law and statutes. The particular instruction to be given in a jury trial is fact specific and based upon the indictment, testimony, evidence, and defenses available to the defendant. The standard instructions are crafted by the Ohio Judicial Conference and sanctioned by the Ohio Supreme Court to assist trial judges and lawyers in correctly and efficiently charging the jury on the law applicable to a particular case. The OJI are authoritative, and are generally to be followed and applied by Ohio's courts. Cf. *State v. Kucharski*, 2d Dist. No. 20815, 2005-Ohio-6541, ¶25, fn. 1. The OJI are tested, both at trial and through

thorough appellate and (usually) Supreme Court review. Standard criminal instructions are written under the particular statutes and existing precedent from the Ohio Supreme Court. When given, they insure accuracy and compliance with constitutional protections afforded to litigants and minimize reversible error." Id. at ¶107.

{¶41} Mr. Jordan's requested instruction offered nothing additional or unique to the circumstances of the case that was not already covered by the standard OJI instruction on self-defense in one's home.

{¶42} **Motion for New Trial-Impeachment of the Jury's Verdict**

{¶43} In support of his motion for a new trial, Mr. Jordan attached several affidavits from certain members of the jury. These jurors stated had Mr. Jordan's proposed instruction been given, they would have found that Mr. Jordan acted in self-defense on the count of felonious assault.

{¶44} Mr. Jordan, however, failed to introduce any "extraneous, firsthand, independent evidence" that would allow the court to consider the juror's affidavits. The only "evidence" Mr. Jordan submitted to support his proposition that Evid.R. 606(B), better known as the aliunde rule, should not apply, and thus, allow the court to consider the juror's affidavits, consisted of citations to cases where the Supreme Court of Ohio and other districts determined the Ohio Jury Instructions should not have applied in those circumstances. We disagree that simply citing to case law is the type of "extraneous, firsthand, independent evidence" contemplated by Evid.R. 606(B) that would permit the consideration of juror testimony to impeach a verdict.

{¶45} The Supreme Court of Ohio explained this rule in *Schiebel*: "[i]n order to permit juror testimony to impeach a verdict, a foundation of extraneous, independent

evidence must first be established. This foundation must consist of information other than the jurors themselves, *Wicker v. Cleveland* (1948), 150 Ohio St. 434, and *the information must be from a source which possesses firsthand knowledge of the improper conduct*." (Emphasis added.) Id. at 75. See, also, *State v. Powell*, 11th Dist. No. 2008-L-116, 2009-Ohio-2821, fn 1; *State v. Turner* (Nov. 2, 2001), 11th Dist. No. 2000-T-0074, 2001 Ohio App. LEXIS 4992, 20-21 (a juror's testimony is not evidence aliunde).

{¶46} In sum, the aliunde rule governs the competency of a juror to testify at a subsequent proceeding concerning the original verdict. And, quite simply, the cases he cites in support of his argument are not the type of "independent, firsthand knowledge" of improper conduct the aliunde rule requires to allow the consideration of information from the jurors themselves.

{¶47} **Victim's Propensity for Violence**

{¶48} Mr. Jordan also contends that the court erred in failing to give the jury his proposed character instruction on Mr. Wynne's propensity for violence. We find this argument to also be without merit because as we determined in *Kidd*, where the jury is instructed on the general credibility of the witnesses and the weight of the evidence, the lack of such an instruction would not change the outcome of the trial. Id. at ¶44-49.

{¶49} The jury was well aware of Mr. Wynne's violent propensities. Both Mr. and Mrs. Jordan testified as to his violent character. Ms. Horvath testified that at the hospital Mr. Wynne told her and Mrs. Jordan that he (meaning himself, Mr. Wynne) "f***** that n***** up." Mr. Wynne presented himself as a hostile state witness, and refused in large part to testify, neither helping the defense or the state. Instead, Mr.

Wynne claimed he was suffering from amnesia from an injury he incurred from a fall while exercising, and could only recall being stabbed on the night in question. Mr. Wynne then testified as to his own criminal history, which included two violent crime convictions in the previous two years for domestic violence. The jury also viewed photographs of the injuries Mr. Jordan incurred to his eye, and the scratches on his face, neck, and back. Thus, there was more than ample evidence for the jury to conclude Mr. Wynne was a violent man.

{¶50} Moreover, "[i]t is well established that '[a] defendant may successfully assert self-defense without resort to proving any aspect of a victim's character.'" *Kidd* at ¶69, quoting *State v. Barnes* (2002), 94 Ohio St.3d 21, 24, 2002-Ohio-68. In this case, however, Mr. Jordan was given the opportunity to enter into evidence the violent nature of Mr. Wynne's character. Combined with the instruction on the general credibility of the witnesses and the weight of the evidence, the jury was free to believe that Mr. Wynne was a violent man, without a specific character instruction on such. Furthermore, Mr. Jordan was given the opportunity to argue and remind the jury of Mr. Wynne's violent propensities during closing argument.

{¶51} Mr. Jordan's first and second assignments of error are without merit.

{¶52} **Manifest Weight of the Evidence**

{¶53} In his third assignment of error, Mr. Jordan contends that the jury's verdict is against the manifest weight of the evidence. Mr. Jordan argues that his conviction for felonious assault is not supported by the manifest weight of the evidence because although he admitted to stabbing Mr. Wynne, he introduced evidence he was acting in self-defense. We disagree with Mr. Jordan's contention. Our review of the trial

transcript reveals that the state introduced ample evidence to support the jury's verdict, thus we find this assignment of error to be without merit.

{¶54} "Unlike sufficiency of the evidence, manifest weight of the evidence raises a factual issue. The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Krug*, 11th Dist. No. 2008-L-085, 2009-Ohio-3815, ¶112, quoting *State v. Higgins*, 11th Dist. No. 2005-L-215, 2006-Ohio-5372, ¶35, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387.

{¶55} "The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." Id. at ¶113, quoting *State v. Fritts*, 11th Dist. No. 2003-L-026, 2004-Ohio-3690, ¶23, citing *State v. Martin* (1983), 20 App.3d 172, 175.

{¶56} "[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of facts." Id. at ¶114, quoting *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. "When examining witnesses' credibility, 'the choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact.'" Id., quoting *State v. Awan* (1986), 22 Ohio St.3d 120, 123. "A factfinder is free to believe all, some, or none of the testimony of each witness appearing before it." Id., citing *State v. Thomas*, 11th Dist. No. 2004-L-176, 2005-Ohio-6570, ¶29.

{¶57} In the case before us, the jury was presented with a story involving an altercation between two men high on drugs and beer, fueled by a dispute over money. The verbal altercation escalated into a physical battle, which came to its end when one of the men was severely injured by a knife.

{¶58} The state presented evidence that Mr. Jordan made Mr. Wynne leave and would not allow Mr. Wynne back into the house to retrieve his coat and car keys. The violence escalated when Mr. Wynne attempted to retrieve his keys, prompting Mr. Jordan to take a knife and stab Mr. Wynne three times, severing a main artery in his left arm.

{¶59} The defense presented the testimony of Mr. Jordan, his wife, and his wife's friend, Ms. Horvath, who all testified to Mr. Wynne's propensity of violence, in addition to Mr. Jordan's testimony that he was acting in self-defense.

{¶60} In the face of these diametrically opposed versions as to who instigated the physical altercation, and in consideration of the credibility of the witnesses and the evidence, the jury found the state's version of events to be more credible. The jury obviously chose not to believe the evidence Mr. Jordan introduced in support of self-defense, and discredited it.

{¶61} "It is well settled that when assessing the credibility of the witnesses, '[t]he choice between credibility of the witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. McFeely*, 11th Dist. No. 2008-A-0067, 2009-Ohio-1436, ¶81, quoting *State v. Reeds*, 11th Dist. No. 2007-L-120, 2008-Ohio-1781, ¶92.

"Furthermore, if the evidence is susceptible to more than one interpretation, a reviewing court must interpret it in a manner consistent with the verdict." Id.

{¶62} In short, the jury was free to believe the evidence and testimony presented by the state over Mr. Jordan's claim of self-defense. Our review of the above evidence reveals that the manifest weight of the evidence supports the jury's verdict, and as such, we cannot conclude the jury so lost its way or created a manifest miscarriage of justice when it convicted Mr. Jordan on the count of felonious assault that a new trial was warranted.

{¶63} Mr. Jordan's third assignment of error is without merit.

{¶64} The judgment of the Lake County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J.,

COLLEEN MARY O'TOOLE, J.,

concur.