

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

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NOS. CA2003-09-017
 : CA2003-09-018
 :
 - vs - : O P I N I O N
 : 9/20/2004
 :
 CHARLOTTE G. BURCHETT aka :
 CHARLOTTE G. MURRAY, et al., :
 :
 Defendants-Appellants. :
 :

CRIMINAL APPEAL FROM PREBLE COUNTY COURT OF COMMON PLEAS
Case No. 02CR008809

Rebecca J. Ferguson, Preble County Prosecuting Attorney, Court-
house, 1st Fl., 101 East Main Street, Eaton, Ohio 45320, for
plaintiff-appellee

William L. Havemann, 2049 Brandy Mill Lane, Dayton, Ohio 45459,
for defendants-appellants, Charlotte (Burchett) Murray and
Ronald Whitener

WALSH, J.

{¶1} Defendants-appellants, Charlotte Murray (a.k.a. Charlotte Burchett) and Ronald Whitener, appeal their convictions in the Preble County Court of Common Pleas. Murray was convicted for obstruction of official business, and Whitener was convicted for resisting arrest and felonious assault on a police officer. Because the causes involve common

questions of law and fact, their cases have been consolidated on appeal. We affirm the convictions.

{¶2} On December 23, 2002, Whitener and his brother-in-law, Kevin Murray, engaged in a physical altercation inside Whitener's home in Camden, Ohio. Whitener's neighbor called 911, and Camden Police Officer Tony Gasper responded to the county dispatch. Officer Gasper arrived at Whitener's home, identified himself, and was allowed into the house by one of Whitener's guests. Officer Gasper entered the kitchen of the home, and placed his body in between Whitener and Kevin. As Officer Gasper attempted to speak with Kevin, Whitener grabbed the officer from behind. Officer Gasper then turned toward Whitener and pushed him away, which caused Whitener to stumble into Whitener's mother, knocking her to the floor. Whitener then told Officer Gasper that the officer was not going to arrest him, and punched the officer in the face.

{¶3} Officer Gasper and Whitener then began fighting, and during the scuffle, Whitener scratched the officer's face and tore the membranes of his nose by sticking his finger in the officer's nostril and ripping it out.¹ Officer Gasper managed to temporarily subdue Whitener with pepper spray while he called for assistance. Officer Gasper then attempted to handcuff Whitener, but Charlotte Murray prevented him from

1. At trial, Whitener denied punching, scratching, or otherwise intentionally harming Officer Gasper.

doing so by grabbing the officer's arm.² After repeatedly instructing Murray to release his arm, Officer Gasper pulled his arm free. Officer Gasper continued to struggle with Whitener, eventually managed to pin Whitener to the floor while handcuffing his hands behind his back.

{¶4} Murray was arrested and charged with obstructing official business in violation of R.C. 2921.31(A). Whitener was arrested and charged with felonious assault in violation of R.C. 2903.11(A)(1) and resisting arrest in violation of R.C. 2921.33(B).

{¶5} The trial court consolidated appellants' cases, and held a jury trial on August 25, 2003. The jury found both appellants guilty of their respective charges. Appellants were sentenced accordingly. Appellants each filed a motion for a new trial, and the trial court denied both motions. Appellants appeal their convictions, raising three assignments of error.

{¶6} Assignment of Error No. 1:

{¶7} "THE TRIAL COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF DEFENDANTS WHEN IT ALLOWED INTO EVIDENCE OVER DEFENDANTS' OBJECTION THE OPINION OF A POLICE OFFICER THAT DEFENDANT/APPELLANT CHARLOTTE MURRAY WAS NOT TRUTHFUL. THE COURT ERRED IN OVERRULING DEFENDANTS' MOTIONS FOR A NEW TRIAL FOR THE SAME REASON."

{¶8} Appellants argue that the trial court committed reversi-ble error in admitting the testimony of Preble County

2. At trial, Murray maintained that she was attempting to remove a watch

Deputy Sheriff Stephen Bratton. Appellants maintain that in his testimony, Deputy Bratton expressed to the jury that he believed Murray had not been truthful during questioning, and that such testimony was an improper attack on Murray's veracity as a witness.

{¶9} It is well-established that the admission or exclusion of evidence rests within the sound discretion of the trial court. State v. Robb, 88 Ohio St.3d 59, 68, 2000-Ohio-275. Absent an abuse of discretion, an appellate court will not disturb a ruling by a trial court as to the admissibility of evidence. State v. Martin (1985), 19 Ohio St.3d 122, 129.

{¶10} At trial, Deputy Bratton testified that during questioning, Murray stated that she was not aware of any problem Whitener had with Officer Gasper prior to this incident. Deputy Bratton further testified that Murray later told him that Whitener had problems with Officer Gasper as the officer had previously arrested him for driving under a suspension. Then, the following transpired:

{¶11} "Deputy Bratton: I then said to her of what, what she had just told me a few minutes ago that she wasn't aware of Ron having a problem --

{¶12} "Attorney: Objection. Again, it's an officer's opinion. Not what she said.

{¶13} * * *

{¶14} "The Court: He's not stating an opinion. Go ahead.

from Whitener's arm, and that she was not attempting to prevent Officer

It's overruled.

{¶15} "Deputy Bratton: I told [Murray] that she had told me a few minutes ago that she wasn't aware of [Whitener] having a problem with [Officer Gasper]. And I told her that she appeared to be changing her story to suit what she wanted to say. I advised her that --

{¶16} "Mr. Havemann: I object, and move that [the] testimony be stricken, your Honor. Again, it's their [sic] opinion of this officer and not relevant to this case.

{¶17} "The court: It's overruled.

{¶18} "Deputy Bratton: I advised her that she was likely going to have to testify about this and that she needed to tell a straight story and to quit changing it to suit her needs."

{¶19} Appellants argue that according to State v. Boston (1989), 46 Ohio St.3d 108, the trial court erred in allowing this testimony. However, appellants' reliance on Boston is misplaced. In Boston, the court held that an expert witness may not testify as to his opinion of the veracity of a child's statements, and that it was reversible error for the trial court to admit an expert's testimony that the victim had been truthful. Id. at 129. According to the court, "[i]t is the fact-finder, not the so-called expert or lay witness, who bears the burden of assessing the credibility and veracity of witnesses." Id.

{¶20} However, in the case at bar, Deputy Bratton did not

testify that he believed Murray was or was not telling the truth. Rather, Deputy Bratton merely detailed his conversation with Murray, noting the inconsistencies of her statements. Deputy Bratton's testimony expressed to the jury merely that Murray had offered two conflicting statements. Moreover, unlike the child victim in Boston who was unavailable to testify, Murray testified at trial. This permitted the jury an opportunity to perceive Murray and to determine her credibility. See State v. Profitt (1991), 72 Ohio App.3d 807. Boston and its progeny are inapplicable to this case, because Deputy Bratton's testimony did not pre-empt the jury's role as the evaluator of Murray's credibility. We find no error in the trial court's decision to permit Deputy Bratton's testimony regarding Murray's inconsistent statements.

{¶21} Further, the trial court properly denied appellants' motions for a new trial. The trial court properly exercised its discretion and no prejudice resulted. Appellants' first assignment of error is overruled.

{¶22} Assignment of Error No. 2:

{¶23} "THE TRIAL COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF DEFENDANT WHITENER WHEN HE INTIMATED IN HIS CHARGE TO THE JURY OVER OBJECTION THAT THE DEFENSE OF SELF-DEFENSE WAS NOT AVAILABLE TO HIM IF HE CAUSED 'GREAT BODILY HARM' TO OFFICER GASPER."

{¶24} Whitener argues that the trial court improperly instructed the jury with regard to Whitener's claim of self-

defense. Whitener argues the trial court should have instructed the jury that he had a right to use such force as necessary to repel Officer Gasper's attack, including the use of force likely to cause death or great bodily harm if such force was in kind to the force utilized by the officer.

{¶25} When reviewing a trial court's jury instructions, the proper standard of review for an appellate court is whether the trial court's refusal to give a requested jury instruction constituted an abuse of discretion under the facts and circumstances of the case. State v. Wolons (1989), 44 Ohio St.3d 64, 68. The term abuse of discretion suggests that the court's attitude was unreasonable, arbitrary, or unconscionable, rather than merely an error of law or judgment. Id.

{¶26} A trial court does not err in failing to instruct the jury where the evidence is insufficient to support the instruction. State v. Palmer, 80 Ohio St.3d 543, 1997-Ohio-312. Further, jury instructions should only be given if they are applicable to the facts in a case. Avon Lake v. Anderson (1983), 10 Ohio App.3d 297, 299.

{¶27} Under Ohio law, self-defense is an affirmative defense. State v. Martin (1986), 21 Ohio St.3d 91. To establish self-defense, the defendant must show "* * * [he] was not at fault in creating the situation giving rise to the affray; (2) * * * [he] has a bona fide belief that he was in imminent danger of death or great bodily harm and that his only

means of escape from such danger was in the use of * * * force; and (3) * * * [he] must not have violated any duty to retreat or avoid the danger." State v. Williford (1990), 49 Ohio St.3d 247, 249.

{¶28} In Williford, the court held that if a person is assaulted in his home, and he reasonably believes that a family member is in imminent danger of serious bodily harm, that person has no duty to retreat from his home, and he may use reasonably necessary force to defend the family member, including the taking of life. *Id.* at 250.

{¶29} In the case at bar, the trial court provided the jury with the instruction provided in 4 Ohio Jury Instructions (2003) Section 411.33, which states:

{¶30} "To establish self-defense, the defendant must prove that the defendant was not at fault in creating the situation giving rise to the assault; and that the defendant 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." Appellant argues that the trial court should have further instructed the jury that he had a right to use such force as necessary to repel Officer Gasper's attack.

{¶31} Upon reviewing the record, we find that Whitener failed to present sufficient evidence to establish that the amount of force Officer Gasper utilized placed Whitener or his

family in imminent danger of death or serious bodily harm. Rather, the evidence indicates that Officer Gasper used only the physical force necessary to stop Whitener's attack and to restrain him. Although Whitener's mother was knocked to the ground during the struggle, it appears that her fall was incidental, as she was holding on to Whitener's arm during the altercation. There is no evidence to suggest Officer Gasper threatened Whitener or any other person with force likely to cause death or great bodily harm. Consequently, the instruction requested by Whitener was not warranted by the facts.

{¶32} We find that the trial court did not abuse its discretion in instructing the jury. The second assignment of error is overruled.

{¶33} Assignment of Error No. 3:

{¶34} "THE TRIAL COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF DEFENDANT/APPELLANT WHITENER WHEN HE REFUSED TO GIVE A WILFORD [SIC] CHARGE TO THE JURY AS REQUESTED IN DEFENDANT'S REQUEST FOR INSTRUCTION NUMBER 3."

{¶35} At trial, Whitener orally requested that the charge to the jury include an instruction that he had no duty to retreat from his own home before using force to defend himself, based on Williford. On appeal, Whitener argues that the trial court erred in failing to include such an instruction.³

3. We note that although appellant's request for such an instruction was not made in writing as required by Crim.R. 30(A), appellant preserved this issue for appeal in orally requesting a modification to the proposed jury instructions. See Williford, 49 Ohio St.3d at 252.

{¶36} Appellant essentially argues that the trial court should have based its jury instructions on 4 Ohio Jury Instructions, at Section 411.31, which applies when a defendant asserts self-defense as a defense against danger of death or great bodily harm. This instruction includes an explanation as to when a person does or does not have a duty to retreat before utilizing force likely to cause death or great bodily harm in self-defense. Instead, the trial court used a self-defense instruction based on 4 Ohio Jury Instructions, at Section 411.33, which applies when a defendant asserts self-defense against bodily harm not likely to cause death or great bodily harm. This instruction contains no language regarding a person's duty to retreat.

{¶37} We find no error in the trial court's instruction on self-defense, or its decision not to amend its instruction to include an explanation on the duty to retreat. Jury instructions are to be tailored to the facts of each case, and only those instructions which are applicable to the facts of the case should be given. Anderson, 10 Ohio App.3d at 299. As noted in our resolution of the second assignment of error, there is no evidence that Whitener or his family were threatened with force likely to cause death or great bodily harm. Thus, Whitener's proposed instruction was not warranted based on the facts of this case, and the instruction given by the trial court was proper. The third assignment of error is overruled.

{¶38} Judgment affirmed.

YOUNG, P.J., and POWELL, J., concur.