[Cite as *State v. Wyatt*, 2011-Ohio-3427.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-07-171
	:	O P I N I O N
- vs -		7/11/2011
	:	
DONALD J. WYATT,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2010-03-0410

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Fred S. Miller, Baden & Jones Bldg., 246 High Street, Hamilton, Ohio 45011, for defendant-appellant

RINGLAND, J.

{¶1} Defendant-appellant, Donald Wyatt, appeals from his conviction in the Butler County Court of Common Pleas for murder. For the reasons outlined below, we affirm.

{¶2} Appellant was charged with murder in violation of R.C. 2903.02(A), an unclassified felony, which included an accompanying firearm specification, after he shot and killed his wife, Rhonda Wyatt, at their Butler County residence. Following a three-day jury

trial, during which time appellant claimed the shooting was purely accidental, appellant was found guilty and sentenced to serve 18 years to life in prison.

{¶3} Appellant now appeals from his conviction, raising three assignments of error for review. For ease of discussion, appellant's second and third assignments of error will be addressed out of order.

{¶4} Assignment of Error No. 1:

{¶5} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT ALLOWED THE STATE TO PRESENT 'OTHER ACTS' EVIDENCE TO THE JURY."

{¶6} In his first assignment of error, appellant argues that the trial court erred by permitting the state to introduce "other acts" evidence regarding the couple's "previous arguments" and "threats" he made towards his wife. We disagree.

{¶7} The admissibility of relevant evidence rests within the sound discretion of the trial court. *State v. Jones*, Butler App. No. CA2006-11-298, 2008-Ohio-865, ¶10, citing *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus. Absent an abuse of discretion, as well as a showing that the appellant suffered material prejudice, an appellate court will not disturb a trial court's ruling as to the admissibility of evidence. *State v. Martin* (1985), 19 Ohio St.3d 122, 129. An abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶130. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *State v. Yeager*, Summit App. No. 21510, 2005-Ohio-4932, ¶29.

{¶8} Pursuant to Evid.R. 404(B), "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." However, "other acts" evidence may be admitted for other purposes, including to

prove motive, opportunity, intent, preparation, plan, knowledge, identity, or the absence of mistake or accident. Evid.R. 404(B); *State v. Pringle*, Butler App. Nos. CA2007-08-193, CA2007-09-238, 2008-Ohio-5421, ¶18. In addition, like Evid.R. 404(B), R.C. 2945.59 allows for the admission of "other acts" evidence to prove "motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question." Neither R.C. 2945.59 nor Evid.R. 404(B), however, "requires that the other act be 'like' or 'similar' to the crime charged, as long as the prior act tends to show one of the enumerated factors." *State v. Wightman*, Fayette App. No. CA2006-12-045, 2008-Ohio-95, ¶26, quoting *State v. Crotts*, 104 Ohio St.3d 432, 2004-Ohio-6550, ¶19.

{¶9} In this case, during appellant's opening statement, appellant's trial counsel claimed the evidence would show appellant unintentionally shot his wife in the back of the head.[1] Thereafter, during its case-in-chief, the state called Brooklin Goins, Rhonda's daughter and appellant's step-daughter, who testified, over appellant's objection, that appellant "brought out" the gun used to kill her mother "in many of the fights that [her mother and appellant] had." Specifically, Goins testified that appellant and her mother would "start arguing really bad to where they're screaming at each other, and he gets [the gun] and holds onto it." Goins also testified that she saw appellant strike her mother, "pull her down to the ground," and "head butt her really hard."

{¶10} The state also called Janice Jordan, Rhonda's mother, who testified, again over appellant's objection, that appellant threatened to kill her daughter approximately two weeks before the shooting. According to Jordan, during an argument regarding the couple's finances, appellant said, "You're not getting my house. I'll kill you first," and later "kind of

1. Specifically, appellant's trial counsel stated: "We're not going to dispute that [appellant] is responsible for killing his wife. We are going to dispute that it was done purposely. We are going to dispute that it was done intentionally and believe the facts and evidence will show that [appellant] did not act intentionally or purposely in causing Rhonda's death."

mumbled, 'I could' or 'I should just kill you.'"[2]

{¶11} As can be seen, by claiming during opening argument that he unintentionally shot his wife in the back of the head, appellant "created the issue of whether he shot [her] accidentally or intentionally, and made it a subject of 'genuine controversy' for the jury." *State v. Muncey* (Feb. 8, 1999), Madison App. No. CA98-03-013, at 9. In turn, as this court has stated previously, "[w]hen the issue at trial is whether the defendant accidentally or intentionally caused the harm to the victim," such as the case here, "then other acts of violence between the defendant and the victim are relevant which tend to prove that the present incident was not accidental." *State v. Phillips* (Sept. 24, 2001), Preble App. No. CA2001-01-002, at 8; see, also, *State v. Carnes* (Mar. 18, 2002), Clermont App. No. CA2001-02-018, at 14-15, 2002-Ohio-1311, *State v. Benson*, Cuyahoga App. No. 87655, 2007-Ohio-830, ¶93; *State v. White* (Oct. 25, 1996), Gallia App. No. 95CA08, 1996 WL 614190, *4.

{¶12} In addition, "prior threats to commit a criminal act" are admissible where such evidence is directly related to prove the absence of mistake or accident. *State v. Rice*, Butler App. No. CA2003-01-015, 2004-Ohio-697, ¶19-20, citing *State v. Sargent* (1998), 126 Ohio App.3d 557, 568. Therefore, because the "other acts" evidence was admissible to prove, at a minimum, that the shooting was not, as appellant claimed, an accident, the trial court did not err in its decision permitting the state to introduce such evidence at trial. See, e.g., *Muncey* at 9-10 (trial court did not err by permitting the state to introduce evidence of prior domestic violence incidents during husband's attempted murder trial where he claimed he accidentally shot his wife). Accordingly, appellant's first assignment of error is overruled.

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2. It should be noted, in clarifying her testimony, Jordan testified that she did not know whether appellant said he "could" or "should" kill her daughter. However, when asked if it "was about killing her," Jordan testified affirmatively.

{¶13} Assignment of Error No. 3:

{¶14} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT ALLOWED THE INTRODUCTION OF HIS HOSPITAL RECORDS INTO EVIDENCE."

{¶15} In his third assignment of error, appellant argues that the trial court erred by permitting the state to introduce his medical records. We disagree.

{¶16} As noted above, the admissibility of relevant evidence rests within the sound discretion of the trial court. *Jones*, 2008-Ohio-865 at ¶10. Absent an abuse of discretion, as well as a showing that the appellant suffered material prejudice, an appellate court will not disturb a trial court's ruling as to the admissibility of evidence. *Martin*, 19 Ohio St.3d at 129.

{¶17} Initially, appellant argues that the trial court erred by permitting the state to introduce appellant's medical records because it "did not timely notify [him] of its intention to offer the records into evidence" as required by R.C. 2317.422. This argument lacks merit.

{¶18} R.C. 2317.422(A), which provides a simplified means of authenticating certain medical records, states, in pertinent part, that "the records, or copies or photographs of the records, of a hospital, * * * in lieu of the testimony in open court of their custodian, person who made them, or person under whose supervision they were made, may be qualified as authentic evidence if any such person endorses thereon the person's verified certification identifying such records, giving the mode and time of their preparation, and stating that they were prepared in the usual course of the business of the institution." *State v. Humphries* (1992), 79 Ohio App.3d 589, 595. Such records, however, "may not be qualified by certification as provided in this section unless the party intending to offer them delivers a copy of them, or of their relevant portions, to the attorney of record for each adverse party not less than five days before trial." R.C. 2317.442(A). In other words, "the proponent must deliver the records or the relevant portion of them to the opposing party at least five days

before trial." *State v. Lee*, Pickaway App. No. 10CA12, 2010-Ohio-6450, ¶23.

{¶19} In this case, on Friday, July 2, 2010, a mere ten days before the start of trial, appellant filed a "Motion to Order the Release and Production of Medical Records" requesting the trial court to "order Atrium Medical Center to release any and all medical records and notes with regard to [his] treatment that was received on February 22, 2010 to February 25, 2010." The trial court subsequently issued the requested order on Tuesday, July 6. Two days later, on Thursday, July 8, appellant's trial counsel, indicating their intent to submit appellant's medical records as part of his defense, delivered the records to the state. Thereafter, according to the trial transcript, "just as soon as [the state] obtained a copy from defense counsel of those records," the state informed appellant's trial counsel that it also intended to use the records at trial.

{¶20} After a thorough review of the record, we cannot say appellant suffered material prejudice from the state's failure to deliver a copy of appellant's medical records to his trial counsel at least five days before the start of trial.[3] As noted above, appellant's trial counsel obtained appellant's medical records no later than Thursday, July 8, four days before the start of trial, and promptly informed the state of their intention to use the records at trial. Therefore, because appellant's trial counsel had already obtained a copy of appellant's medical records, and because they also intended to submit the records as part of appellant's defense at trial, appellant's trial counsel was most certainly aware of their contents.

{¶21} Nevertheless, appellant, while acknowledging that he was not prejudiced "from the fact that [he] was not aware of what was contained in the records," argues that he was prejudiced due to "his inability to cross-examine the personnel at the hospital, given the lack

3. It should be noted, appellant's trial counsel, by delivering appellant's medical records it intended to submit at trial to the state on Thursday, June 8, a mere four days before the start of trial, also arguably violated the express terms of R.C. 2317.422(A).

of sufficient time to subpoena the witnesses." Appellant, however, never attempted to subpoena any of the hospital personnel prior to the start of trial, nor did he request a continuance in order to subpoena these witnesses. In addition, by first requesting an order to release his medical records a mere ten days before the start of trial, appellant was, at least in part, responsible for creating the brief period in which he could subpoena any necessary witnesses before his trial began. Appellant's first argument, therefore, is overruled.

{¶22} Appellant also argues that the trial court erred by permitting the state to introduce appellant's medical records as such admission violated his "patient-physician privilege." Appellant, however, did not object to the admission of his medical record on this basis. Therefore, as to this issue, appellant has waived all but plain error on appeal. See *State v. Blevins*, 152 Ohio App.3d 39, 2003-Ohio-1264, ¶21; *State v. Wagers*, Preble App. No. CA2009-06-018, 2010-Ohio-2311, ¶48.

{¶23} Pursuant to Crim.R. 52(B), plain error exists where there is an obvious deviation from a legal rule that affected the defendant's substantial rights or influenced the outcome of the proceedings. *State v. Blanda*, Butler App. No. CA2010-03-050, 2011-Ohio-411, ¶20, citing *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. Notice of plain error must be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. *State v. Bai*, Butler App. No. CA2010-05-116, 2011-Ohio-2206, ¶117 citing *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus. Accordingly, an appellate court will not reverse a trial court's decision on plain error grounds unless the outcome of the trial would have been different. *State v. Stout*, Warren App. No. CA2010-04-039, 2010-Ohio-4799, ¶56.

{¶24} After a thorough review of the record, it is apparent that appellant voluntarily disclosed his medical records to the state in anticipation of submitting them as part of his defense at trial. By voluntarily disclosing his medical records to the state, appellant has

effectively waived his patient-physician privilege as it relates to those records. See *State v. Moore*, Lorain App. No. 00CA007587, 2001 WL 111559, *3; see, generally, *Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, syllabus. Furthermore, it is clear that appellant opened the door to the introduction of his medical records by eliciting testimony on cross-examination regarding his medical and psychological condition following the shooting.[4] Therefore, because appellant waived his patient-physician privilege as it relates to his medical records by providing them to the state, and because appellant opened the door to the introduction of his medical records by placing his medical condition at issue, we find the trial court did not err, let alone commit plain error, by permitting the state to introduce his medical records at trial. Accordingly, appellant's second argument is overruled.

{¶25} In light of the foregoing, because we find no error in the trial court's decision admitting appellant's medical records at trial, appellant's third assignment of error is overruled.

{¶26} Assignment of Error No. 2:

{¶27} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT REFUSED TO PROVIDE CERTAIN JURY INSTRUCTIONS."

{¶28} In his second assignment of error, appellant initially argues that the trial court erred in its decision refusing to instruct the jury on the lesser-included offense of reckless homicide. We disagree.

{¶29} Jury instructions are matters left to the sound discretion of the trial court. *State v. Harry*, Butler App. No. CA2008-01-013, 2008-Ohio-6380, ¶35, citing *State v. Guster*

4. For instance, during appellant's cross-examination of Officer Timothy Bushong, an officer with the Trenton Police Department assigned to guard appellant after he was admitted to the Atrium Medical Center, appellant's trial counsel asked if appellant told the officer he had consumed "about fifty pills" immediately following the shooting. Officer Bushong testified affirmatively. The medical records, however, indicate appellant did not consume "fifty pills" as he claimed.

(1981), 66 Ohio St.2d 266, 271. This court, therefore, reviews the trial court's decision refusing to provide the jury with a requested jury instruction for an abuse of discretion. *State v. Gray*, Butler App. No. CA2010-03-064, 2011-Ohio-666, ¶23, citing *State v. Wolons* (1989), 44 Ohio St.3d 64, 68.

{¶30} A jury instruction on a lesser included offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction on the lesser included offense. *State v. Carroll*, Clermont App. Nos. CA2007-02-030, CA2007-03-041, 2007-Ohio-7075, ¶136, citing *State v. Carter*, 89 Ohio St.3d 593, 600, 2000-Ohio-172. An instruction is not warranted, however, simply because the defendant offers "some evidence" to establish the lesser included offense. *State v. Gray*, Butler App. No. CA2010-03-064, 2011-Ohio-666, ¶23, citing *State v. Shane* (1992), 63 Ohio St.3d 630, 632-633. Instead, there must be "sufficient evidence" to "allow a jury to *reasonably* reject the greater offense and find the defendant guilty on a lesser included (or inferior-degree) offense." (Emphasis sic.) *State v. Anderson*, Butler App. No. CA2005-06-156, 2006-Ohio-2714, ¶11, quoting *Shane* at 632-633. In making this determination, the trial court must consider the evidence in a light most favorable to the defendant. *State v. Braylock*, Lucas App. No. L-08-1433, 2010-Ohio-4722, ¶33, citing *State v. Smith* (2000), 89 Ohio St.3d 323, 331.

{¶31} In this case, appellant claimed the shooting that resulted in his wife's death was purely accidental. "Accident," while not an affirmative defense, "is that which is unintentional and unwilled and implies a lack of criminal culpability." *State v. Poole* (1973), 33 Ohio St.2d 18, 20; *State v. Thomas*, Butler App. No. CA2008-08-197, 2009-Ohio-4261, ¶24, quoting *State v. Ross* (1999), 135 Ohio App.3d 262, 276; *State v. Barnd* (1993), 85 Ohio App.3d 254, 260. "Reckless conduct goes beyond what is considered to be an accident." *State v. Easley*, Franklin App. No. 07AP-578, 2008-Ohio-468, ¶60. In turn, by claiming the shooting was

purely accidental, any argument advanced by appellant claiming culpability for his wife's death, but only to a lesser extent, was wholly inconsistent with his theory of the case. See id. (stating "an accident claim is inconsistent with recklessness"); see, also, *State v. Cutts*, Stark App. No. 2008CA000079, 2009-Ohio-3563, ¶123; see, generally, *State v. Rigdon*, Warren App. No. CA2006-05-064, 2007-Ohio-2843, ¶46-47.

{¶32} Regardless, after a thorough review of the record, we find that the trial court did not abuse its discretion in refusing to instruct the jury on reckless homicide. The only evidence even remotely supporting the theory that appellant acted recklessly was his own testimony indicating a "sudden movement" caused the gun to discharge when he went to hug his wife while he held it by his side with his finger on the trigger and the hammer pulled back.[5] The state, however, introduced evidence indicating the gun, which contained internal mechanisms requiring the trigger to be "pulled completely to the rear" with at least 3.1 to 4.6 pounds of pressure before it would fire, was discharged no further than four inches from the back of Rhonda's head. The state also introduced evidence indicating the gun did not have any abnormalities that would allow it to discharge on its own.

{¶33} As this court has stated previously, "even where the defendant offers some evidence through his own testimony supporting a lesser-included offense, he is still not entitled to an instruction on that offense if the totality of the evidence does not reasonably support an acquittal on the greater offense and a conviction on the lesser offense." *State v. Anderson*, Butler App. No. CA2005-06-156, 2006-Ohio-2714, ¶13, quoting *State v. Neely*, 161 Ohio App.3d 99, 2005-Ohio-2342, ¶46. In this case, given the totality of this evidence, we cannot say that the jury could have *reasonably* rejected the murder charge only to accept

5. As appellant testified, "I let the handle of the gun out of the palm of my hand, and it – the weight of it just kind of fell back, and my thumb was now somewhere on top of the trigger above the sights." Appellant also testified, however, that he did not know "exactly how it happened," but that "he didn't pull that trigger."

the lesser-included offense of reckless homicide. See *State v. Freeman*, Franklin App. No. 07AP-337, 2007-Ohio-6859, ¶15-17. The trial court, therefore, did not err in its decision refusing to instruct the jury on the lesser-included offense of reckless homicide. Accordingly, appellant's first argument is overruled.

{¶34} Next, also under his second assignment of error, appellant argues that the trial court erred by refusing to instruct the jury on accident. We disagree.

{¶35} A trial court must give the jury all instructions that are relevant and necessary for the jury to weigh the evidence and fulfill its duty as the fact finder. *State v. Curtis*, Butler App. No. CA2008-01-008, 2009-Ohio-192, ¶68, citing *State v. Comen* (1990), 50 Ohio St.3d 206, 210. The decision to give or not give a jury instruction, however, generally lies within the trial court's sound discretion. *State v. Campbell*, Butler App. No. CA2009-01-002, 2009-Ohio-6044, ¶57.

{¶36} In this case, the trial court properly instructed the jury that in order to find appellant guilty of murder it was required to find appellant "purposely caused the death of Rhonda Wyatt." See R.C. 2903.02(A). In further instructing the jury on "purpose," which the trial court correctly classified as an "essential element of the offense of murder," the trial court stated that "[p]urpose is a decision of the mind to do an act with a conscious objective of producing a specific result. *To do an act purposely is to do it intentionally and not accidentally*. Purpose and intent mean the same thing." (Emphasis added.)

{¶37} As can be seen, the trial court's instructions clearly informed the jury that before finding appellant guilty of murder that it was required to find appellant acted "intentionally and not accidentally." This instruction, therefore, accurately "advise[d] the jury that if it [found] that the shooting was the result of an 'accident,' then the act could not have been done intentionally." See *State v. Stallings*, 89 Ohio St.3d 280, 291, 2000-Ohio-164 (finding no prejudicial error in trial court's decision rejecting defendant's request for an instruction on

accident in a capital murder trial). In turn, although it may have been better practice for the trial court to provide a separate and distinct instruction regarding the defense of accident to the jury, the effect of such an instruction would have simply served as a reminder to the jury that appellant presented evidence to negate the essential element of "purpose." See *State v. Sunderman*, Stark App. No. 2006-CA-00321, 2008-Ohio-3465, ¶27; *State v. Johnson*, Franklin App. No. 06AP-878, 2007-Ohio-2792; *State v. Smith*, Miami (May 10, 1996), App. No. 95-CA-17, 1996 WL 239823, *8; *State v. Manbevers* (Sept. 28, 1994), Pickaway App. No. 93CA23, 1994 WL 529966, *6.

{¶38} In addition, based on a thorough review of the record, we find a separate and distinct instruction regarding the defense of accident "would not have added anything to the general instruction." *State v. Horton*, Stark App. No. 2007-CA-00085, 2007-Ohio-6469, ¶104; *State v. Taylor*, Richland App. No. 2005-CA-0112, 2006-Ohio-4064, ¶44; *State v. Glagola*, Stark App. No. 2003CA00006, 2003-Ohio-6018, ¶26; see, also, *State v. Martin* (Dec. 24, 1996), Franklin App. Nos. 96APA04-450, 96APA04-459, 1996 WL 737576, *13. "Accident is an argument that supports a conclusion that the state has failed to prove the intent element of the crime beyond a reasonable doubt." *Johnson* at ¶59, citing *State v. Atterberry* (1997), 119 Ohio App.3d 443, 447. In essence, "the defense claim of accident simply 'constitutes a denial or contradiction of evidence offered by the prosecution to prove an intent to kill.'" *Stallings* at 291, 2000-Ohio-164, quoting *Poole*, 33 Ohio St.2d at 20. Therefore, "[i]f the jury had credited appellant's argument" claiming the shooting was purely accidental, the jury "would have been required to find [appellant] not guilty of murder pursuant to the court's instructions." *Manbevers*, 1994 WL 529966 at *6; *State v. Staats*, Summit App. No. 15706, 1994 WL 122266, *5; see, also, *Sunderman* at ¶27-28.

{¶39} As noted by the Tenth District Court of Appeals, "[t]here are circumstances where the jury receives instructions that sufficiently allow it to consider the accident defense

even without the accident instruction." *State v. Martin*, Franklin App. No. 07AP-362, 2008-Ohio-3299, ¶17. Such is the case here. Therefore, we find the trial court did not err by refusing to provide a separate and distinct instruction to the jury regarding the defense of accident. Accordingly, appellant's second argument is overruled.

{¶40} In light of the foregoing, because we find no error in the trial court's decision refusing to instruct the jury as to the lesser-included offense of reckless homicide or as to the defense of accident, appellant's second assignment of error is overruled.

{¶41} Judgment affirmed.

POWELL, P.J., and HUTZEL, J., concur.