

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

STATE OF OHIO,	:	
	:	CASE NO. CA2014-06-042
Plaintiff-Appellee,	:	
	:	<u>OPINION</u>
	:	4/13/2015
- vs -	:	
	:	
JACOB LLOYD TOLLE,	:	
	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS  
Case No. 13CR0618

D. Vincent Faris, Clermont County Prosecuting Attorney, Nicholas Horton, 76 South Riverside Drive, 2nd Floor, Batavia, Ohio 45103, for plaintiff-appellee

R. Daniel Hannon, Clermont County Public Defender, Robert F. Benintendi, 302 East Main Street, Batavia, Ohio 45103, for defendant-appellant

**M. POWELL, J.**

{¶ 1} Defendant-appellant, Jacob Lloyd Tolle, appeals his conviction in the Clermont County Court of Common Pleas for felonious assault.

{¶ 2} Appellant was indicted in October 2013 on one count of felonious assault in violation of R.C. 2903.11(A)(1). The state alleged that on September 20, 2013, appellant, an inmate in the "supermax" block of the Clermont County Jail, struck Corrections Officer Shaun

Thompson with a food tray, once in the face and once on the officer's right arm. Officer Thompson suffered an abrasion on his forehead and a bone fracture in his right forearm as a result of the attack. A jury trial held in April 2013 revealed the following facts.

{¶ 3} On September 20, 2013, appellant was incarcerated in pod D of the Clermont County Jail. Officer Thompson testified he was delivering breakfast to inmates in pod B that morning when he heard a "very loud banging" and appellant scream. Minutes earlier, the officer had talked to appellant in pod D without incident. As Officer Thompson approached appellant's cell, the officer noticed that appellant was "extremely irate," "appeared to be in a rage," and was screaming. Appellant was also pounding on the window of his door. Officer Thompson called for additional assistance and told appellant to calm down. Appellant screamed at the officer through the window and warned him not to come into the cell. At that moment, the door to appellant's cell began to slide open.

{¶ 4} Officer Thompson testified that as soon as the door was open wide enough, appellant "took his breakfast tray and struck" the officer first in the head, then on his right arm. According to the officer, appellant struck him in the right arm in a "chop[ping] down" manner. The officer entered the cell and used three different techniques in his efforts to subdue appellant.<sup>1</sup> Shortly after, three officers came to Officer Thompson's assistance. It was not until appellant was pepper-sprayed that he stopped resisting.

{¶ 5} When Officer Thompson tried to pick up appellant off the floor, the officer had a "very awkward feeling" in his right arm. An x-ray taken later that day revealed an ulnar shaft fracture in the officer's right arm.<sup>2</sup> Officer Thompson testified he did not receive any other blows to his arm that day, nor was he hit accidentally by the officers coming to his assistance.

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1. The techniques used by Officer Thompson to subdue appellant were the wall stabilization technique, the front fall-line takedown, and common peroneal strikes.

2. The ulna is "the medial and larger of the two bones of the forearm." *Steadman's Medical Dictionary* 1511 (5th Ed.1984).

The officer also testified he never used his right arm to brace himself nor did he fall on the floor or against the wall during his struggle with appellant.

{¶ 6} On April 23, 2014, the jury found appellant guilty as charged. Appellant was sentenced to eight years in prison.

{¶ 7} Appellant appeals, raising one assignment of error:

{¶ 8} THE TRIAL COURT ERRED IN FAILING TO PROVIDE THE JURY WITH AN INSTRUCTION ON THE LESSER INCLUDED OFFENSE OF ASSAULT.

{¶ 9} Appellant argues the trial court erred in refusing to instruct the jury on assault and reckless assault as lesser included offenses of felonious assault. Appellant asserts that the jury could have found that Officer Thompson's bone fracture did not result from being struck by the tray but in the ensuing struggle. Appellant also asserts that because there was sufficient evidence to conclude something other than the tray could have fractured the officer's arm, the jury could have found appellant recklessly caused the serious physical harm to the officer, rather than knowingly.

{¶ 10} Appellant was convicted of felonious assault, in violation of R.C. 2903.11(A)(1), which states in relevant part: "No person shall knowingly cause serious physical harm to another." Assault, in violation of R.C. 2903.13(A), is a lesser included offense of felonious assault, in violation of R.C. 2903.11(A)(1). *State v. Church*, 12th Dist. Butler No. CA2011-04-070, 2012-Ohio-3877, ¶ 23. Likewise, reckless assault, in violation of R.C. 2903.13(B), is a lesser included offense of felonious assault, in violation of R.C. 2903.11(A)(1). *State v. Gatliff*, 12th Dist. Clermont No. CA2012-06-045, 2013-Ohio-2862, ¶ 51.

{¶ 11} A jury instruction on a lesser included offense is required only where the evidence presented at trial would reasonably support both an acquittal of the crime charged and a conviction on the lesser included offense. *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, ¶ 192. An instruction is not warranted every time the defendant offers "some

evidence" to support the lesser included offense. *Id.*; *Gatliff* at ¶ 50. Rather, there must be "sufficient evidence" to "allow a jury to reasonably reject the greater offense and find the defendant guilty on a lesser included offense." *Trimble* at 192. In deciding whether to instruct the jury on a lesser included offense, the trial court must consider the evidence in a light most favorable to the defendant. *Id.* We review the trial court's decision refusing to give a requested jury instruction for an abuse of discretion. *State v. Doby*, 12th Dist. Butler No. CA2013-05-084, 2014-Ohio-2471, ¶ 17.

{¶ 12} Appellant first requested a jury instruction on assault. Under R.C. 2903.13(A), "[n]o person shall knowingly cause \* \* \* physical harm to another[.]" The distinction between felonious assault and assault is that the latter only requires physical harm. However, "[w]here injuries to the victim are serious enough to cause him to seek medical treatment, the finder of fact may reasonably infer that the force exerted on the victim caused serious physical harm as defined by R.C. 2901.01(A)(5)." *State v. Lee*, 8th Dist. Cuyahoga No. 82326, 2003-Ohio-5640, ¶ 24. In addition, "[w]here the assault causes a bone fracture, the element of serious physical harm is met." *Id.* See also *State v. Lee*, 6th Dist. Lucas No. L-06-1384, 2008-Ohio-253, ¶ 30.

{¶ 13} As a result of the altercation with appellant, Officer Thompson suffered a bone fracture in his right forearm. The officer testified that his arm was in a cast for approximately five months, and during that period of time, he took pain medication and was put on light duty status. The officer further testified that seven months after the incident, he has dull aches and pain in his right arm almost on a daily basis. In addition, his arm has lost strength and has some mobility issues.

{¶ 14} In light of the foregoing, we find that no reasonable jury could have concluded that Officer Thompson suffered anything less than serious physical harm. The trial court, therefore, did not abuse its discretion when it refused to instruct the jury on assault. See

*State v. Thornton*, 2d Dist. Montgomery No. 20652, 2005-Ohio-3744 (assault jury instruction as a lesser included offense of felonious assault was not appropriate where victim suffered "severe" physical harm and not just physical harm).

{¶ 15} Appellant also requested a jury instruction on reckless assault. Under R.C. 2903.13(B), "[n]o person shall recklessly cause serious physical harm to another or to another's unborn." The distinction between felonious assault and reckless assault is the mental state. A person acts knowingly when, "regardless of purpose, the person is aware that [his] conduct will probably cause a certain result or will probably be of a certain nature." R.C. 2901.22(B). By contrast, "[a] person acts recklessly when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that [his] conduct is likely to cause a certain result or is likely to be of a certain nature." R.C. 2901.22(C).

{¶ 16} Upon reviewing the evidence presented at trial, we find that the jury could not have reasonably concluded that appellant was guilty only of the lesser included offense of reckless assault, but not of the greater offense of felonious assault.

{¶ 17} The evidence at trial showed that right before he struck Officer Thompson with the tray, appellant was very angry and explicitly warned the officer not to enter his cell. Once his cell door was open enough, appellant immediately struck the officer with the tray, first in the head and then on the officer's right arm. Given this evidence, the jury could not have reasonably concluded that appellant merely acted recklessly when he struck the officer with the tray or during their subsequent struggle. Rather, the evidence showed appellant acted knowingly, that is, he was aware his "conduct will probably cause a certain result or will probably be of a certain nature." R.C. 2901.22(B). See *State v. Conroy*, 8th Dist. Cuyahoga No. 72987, 1998 WL 655508 (Sept. 24, 1998) (evidence a defendant acted knowingly can be shown not only from the strength and placement of the kick, but also from the defendant's

actions just prior to the kick); *State v. Jackson*, 10th Dist. Franklin No. 94APA04-531, 1994 WL 694867 (Dec. 8, 1994) (under the felonious assault statute, state need only prove that the defendant acted knowingly regardless of his purpose; state need not prove the defendant acted purposely, that is, that it was the defendant's specific intention to cause a certain result).

{¶ 18} The trial court therefore did not abuse its discretion when it refused to instruct the jury on reckless assault. Appellant's assignment of error is overruled.

{¶ 19} Judgment affirmed.

PIPER, P.J., and RINGLAND, J., concur.