[Cite as *State v. Collier*, 2005-Ohio-119.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. Case No. 20131
v.	:	T.C. Case No. 03-CR-00224
DARNELL COLLIER	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 14th day of January, 2005.

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MATHIAS H. HECK, JR., Prosecuting Attorney, By: JOHNNA M. SHIA, Assistant Prosecuting Attorney, Atty. Reg. #0067685, Appellate Division, P.O. Box 972, 301 W. Third Street, Suite 500, Dayton, Ohio 45422
Attorneys for Plaintiff-Appellee

JON PAUL RION, Atty. Reg. #0067020, P.O. Box 10126, 130 W. Second Street, Suite 2150, Dayton, Ohio 45402
Attorney for Defendant-Appellant

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FAIN, J.

{¶ 1} Defendant-appellant Darnell Collier appeals from his conviction and sentence for Felonious Assault. Collier contends that the trial court erred in instructing the jury and by denying his motion for post-trial relief. He also contends that he was denied a fair trial due to two instances of prosecutorial misconduct.

{¶ 2} We conclude that the trial court did not err in instructing the jury. We

also conclude that we cannot address the merits regarding Collier's motion for post-trial relief, because that issue is not within the scope of this appeal. Finally, we conclude that Collier has demonstrated one instance of prosecutorial misconduct justifying relief from conviction.

{¶ 3} Accordingly, the judgment of the trial court is Reversed, and this cause is Remanded for a new trial.

I

{¶ 4} In January 2003, Tom Haliburda and Daniel Salters were working for a repossession company. They were instructed to repossess a vehicle owned by Darnell Collier and located at 1730 Kensington Drive in Dayton. Upon arrival at Kensington Drive, Haliburda and Salters began to hook Collier's vehicle to their tow truck. At that time, two young girls came out of the residence and asked for permission to clean out the vehicle. The girls removed the contents of the car, locked it and went back inside the residence with the vehicle keys.

{¶ 5} As Haliburda and Salters continued the removal of the vehicle, one of the girls approached them with a telephone and asked them to speak to her "daddy." Haliburda took the telephone and spoke to someone who demanded that Haliburda "put [his] car down [because he] paid for it." Thereafter, a van arrived at the residence. Collier exited from the van with a cell phone which he threw back into the van. At that point, the telephone conversation between Haliburda and the unknown man ended.

{¶ 6} Collier approached and began to argue with Haliburda and Salters

about the vehicle. Collier displayed a gun and demanded that the two put the vehicle down. Haliburda and Salters got into their tow truck and began to leave the area. As they did so, Collier shot out one front tire and two rear tires of the tow truck. The tow truck kept going. Collier fired a final shot at the truck. The bullet hit the light bar on top of the truck. It then traveled through the truck, past the driver's headrest and exited the windshield.

{¶ 7} Collier was indicted on two counts of Felonious Assault with a deadly weapon in violation of R.C. 2903.11(A)(2). Each count carried a firearm specification. Following a jury trial, Collier was convicted of Felonious Assault upon Haliburda, but he was acquitted of Felonious Assault upon Salters. Collier was sentenced accordingly. From his conviction and sentence, Collier appeals.

II

{¶ 8} Collier's First Assignment of Error states as follows:

{¶ 9} "THE INSTRUCTIONS IN THIS CASE ALLOWED THE JURY TO CONVICT BASED ON A MERE NEGLIGENCE STANDARD, AND BECAUSE OF THIS LESSENED BURDEN OF PROOF APPELLANT WAS DENIED A FAIR TRIAL AS GUARANTEED BY THE DUE PROCESS CLAUSES OF THE UNITED STATES AND OHIO CONSTITUTIONS."

{¶ 10} Collier contends that the trial court's instructions to the jury were erroneous, thereby depriving him of due process of law. Specifically, he contends that the use of the following instructions was error:

{¶ 11} "[Felonious Assault requires that you find that] the Defendant

knowingly caused or attempted to cause physical harm to Daniel Salters by means of a deadly weapon.

{¶ 12} ***

{¶ 13} "Knowingly. A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result. A person has knowledge of circumstances when he is aware that such circumstances probably exist. Knowingly means that a person is aware of the existence of the facts that his acts will probably cause a certain result. *** [K]nowledge is determined from all of the facts and circumstances in evidence.

{¶ 14} ***

{¶ 15} "Cause is an act or failure to act, which in a natural and continuous sequence directly produces the physical harm to a person, and without which it would not have occurred.

{¶ 16} "The Defendant's responsibility is not limited to the immediate or most obvious result of the defendant's act or failure to act. The Defendant is also responsible for the natural and foreseeable consequences that follow in the ordinary course of events from the act or failure to act."

{¶ 17} Collier argues that when these instructions are "read together, they allow for a conviction based upon something more akin to mere negligence." He also argues that the "discussion of 'natural and foreseeable consequences' effectively diluted the requirement that the defendant act knowingly." Finally, he argues that the instructions were thus constitutionally deficient because they "allowed for a conviction based on a mental state of something less than

'knowledge'".

{¶ 18} At the outset we note that Collier did not raise any objection to the use of these instructions at the time the trial court charged the jury. Therefore, we must review this Assignment of Error under a plain error standard.

{¶ 19} Crim.R. 52(B) provides that "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." In applying the plain error doctrine, "reviewing courts must proceed with the utmost caution, limiting the doctrine strictly to those extremely rare cases where exceptional circumstances require its application to prevent a manifest miscarriage of justice, and where the error complained of, if left uncorrected, would have a material adverse effect on the character of, and public confidence in, judicial proceedings." *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121, 1997-Ohio-401.

{¶ 20} We note, as Collier acknowledges, that the instructions used by the trial court are those set forth in Ohio Jury Instructions. We find no error in any of the individual instructions given by the trial court, since all of the terms were correctly defined. We understand Collier's concern that the correct definition of proximate cause, focusing upon the foreseeability of the harm caused as a result of the act, following upon the heels of the correct definition of the mental culpability state of "knowingly," might cause a jury to lose track of the fact that the element of the foreseeability of the harm does not supplant or replace the element of "knowingly," but is an additional element that the State must prove beyond reasonable doubt. Ideally, a judge's instruction to a jury might point out to the jury that the element of foreseeability is in addition to, not instead of, the element of

"knowingly." Nevertheless, the instruction was given in the form set forth in Ohio Jury Instructions, and we cannot say that it constituted plain error.

{¶ 21} Collier's First Assignment of Error is overruled.

III

{¶ 22} Collier's Second Assignment of Error is as follows:

{¶ 23} "THE TRIAL COURT ERRED AND DENIED APPELLANT HIS FEDERAL CONSTITUTIONAL RIGHT TO A FAIR TRIAL WHEN IT REFUSED TO INSTRUCT ON THE LESSER INCLUDED OFFENSE OF ATTEMPTED NEGLIGENT ASSAULT."

{¶ 24} Collier contends that the trial court erred when it denied his request to instruct the jury on the offense of Attempted Negligent Assault as a lesser-included offense of Felonious Assault.

{¶ 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" implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 26} R.C. 2903.14 defines Negligent Assault as negligently causing physical harm to another. "A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with

respect to circumstances when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances may exist." R.C. 2901.22(D). R.C. 2923.02 defines "attempt" as follows: "No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense."

{¶ 27} We find no merit in Collier's claim. Collier seeks an instruction that he purposely or knowingly attempted to commit Negligent Assault. This instruction would require a finding that he purposely tried to act in a negligent manner - something that makes no logical sense to this Court.

{¶ 28} Collier's Second Assignment of Error is overruled.

IV

{¶ 29} Collier's Third Assignment of Error states as follows:

{¶ 30} "THE TRIAL COURT COMMITTED AN ABUSE OF DISCRETION WHEN IT DENIED APPELLANT'S MOTION FOR NEW TRIAL/PETITION FOR POST CONVICTION RELIEF WITHOUT FIRST CONDUCTING A HEARING."

{¶ 31} Collier contends that the trial court abused its discretion by denying his post-conviction motions without holding a hearing. Specifically, he claims that the trial court should have afforded him a hearing on his claim of alleged juror misconduct prior to overruling his motions.

{¶ 32} Collier was convicted on August 6, 2003. The trial court entered a termination entry on August 28, 2003. Collier filed his motion for post-conviction

relief and new trial on September 18, 2003. While we note that Collier's notice of appeal was filed after the date he filed his motion for post-conviction relief, the notice of appeal does not purport to appeal from any order of the trial court entered after the termination entry of August 28, 2003.

{¶ 33} App.R. 3(D) provides in pertinent part "[t]he notice of appeal * * * shall designate the judgment, order or part thereof appealed from * * *." "App.R. 3 must be construed in light of the purpose of a notice of appeal, which is to notify appellees of the appeal and advise them of 'just what appellants * * * [are] undertaking to appeal from.' ". *Parks v. Baltimore & Ohio RR.* (1991), 77 Ohio App.3d 426, 428, citations omitted.

{¶ 34} An appellate court "is without jurisdiction to review a judgment or order that is not designated in the appellant's notice of appeal. " *Slone v. Bd. of Embalmers & Funeral Directors of Ohio* (1997), 123 Ohio App.3d 545, 548, citations omitted.

{¶ 35} We conclude that we are without jurisdiction to address the issue raised in this Assignment of Error. Accordingly, the Third Assignment of Error is overruled.

V

{¶ 36} The Fourth Assignment of Error advanced by Collier is as follows:

{¶ 37} "THE PROSECUTION COMMITTED MISCONDUCT AND DENIED APPELLANT A FAIR TRIAL, AS GUARANTEED BY THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES

CONSTITUTION, AND ARTICLE I, SECTION TEN OF THE OHIO CONSTITUTION, WHEN IT MISDEFINED 'PHYSICAL HARM'".

{¶ 38} Collier contends that the conviction should be reversed due to prosecutorial misconduct committed during closing argument. Specifically, Collier objects to the following statements made by the prosecutor:

{¶ 39} "Physical harm. Ladies and gentlemen, you're sitting there saying to yourself, thank God there was no physical harm. But, actually, let me make a case - let the Judge and let the Court rules and let the law make the case for there actually was physical harm. Both Halaberta [sic] and Salters told you then and now, they were scared to death.

{¶ 40} "Now, what happens when people get scared? Their voice shakes, their - they get excited, you get - you get clammy, your - you turn white, you soil yourself, you do - you – you're afraid – and to their afraid [sic] to this day. Afraid to this day, and they told you that.

{¶ 41} "Physical harm means any injury, illness, or other physiological impairment, regardless of its gravity or duration. Webster's New Collegiate - physiological...

{¶ 42} "MR. RION: Objection...

{¶ 43} "****

{¶ 44} "THE COURT: Overruled. You can go on.

{¶ 45} "THE PROSECUTOR: Physiological - number one: relating to physiology. Thank you, Mr. Webster. But, number two: characteristic of or appropriate to an organism's healthy or normal function.

{¶ 46} "I would suggest to you that if the law says, regardless of gravity or duration, when you scare somebody and however many months later - what are we? Five months later? Six months later, they're still scared, you have inflicted physical harm of gravity and duration, however slight, but - but wait. Let's not shortchange this.

{¶ 47} "You know, I - I used to, uh - my Buckeye friends, forgive me. I - I came from the State of Michigan, and in the State of Michigan - the law said that every time you did an indictment, you always had to put language at the end of every indictment that said, and against the peace and dignity of the people of the State of Michigan. And, – and I always liked that, because certain things are against person's dignity and they're against the peace - for example, of that neighborhood. Those people deserve better than to have somebody out squeezin' shots off at a truck and a couple of truck drivers. They deserve better than that...

{¶ 48} "MR. RION: Objection.

{¶ 49} "***

{¶ 50} "THE COURT: Overruled.

{¶ 51} "THE PROSECUTOR: Against the peace and dignity. Carrington [sic] and Salter deserve better - boom - than to be shot at just doin' their job. Whether they were right or wrong, that didn't - that's not right. It shouldn't have come to that.

{¶ 52} "The physical harm, ladies and gentlemen, is what you saw right here when those two men said to you, I was frightened and I'm still scared.

{¶ 53} "MR. RION: Objection.

{¶ 54} "THE COURT: Overruled.

{¶ 55} "THE PROSECUTOR: That's harm however – that's harm however you characterize it. And, if it happened to you, you'd say it was harm, too. Dang it. I do my job. I was just doin' my job. You had no right to make me scared every time I went back out there.

{¶ 56} "***

{¶ 57} "I think we - I think we need to be candid about this. Shooting the tire is an affront to the tire, and an affront to the peace and dignity of the people of Kensington. But, that's not what he's charged with. Shooting the back tire is an affront to the back tire, and to the tow truck, and to the peace and dignity of the people on Kensington, but that's not what he's charged with.

{¶ 58} "But, firing that shot just like this, right into that back window - you pick the distance, from about there, right for his head. That's a crime because he both attempted to cause physical harm, and in fact, caused physical harm for the two people sitting on the other side of the glass that the bullet shattered. And, there's no social utility in it. There was no reason for it."

{¶ 59} Collier argues that this argument is contrary to law and that it prejudiced the jury. The State argues that the prosecutor correctly defined the word "physiological" and properly argued that the victims' lives "have been altered because they are still scared today." The State further argues that Collier failed to show that he was prejudiced by this portion of the argument.

{¶ 60} Generally, prosecutors are entitled to considerable latitude in opening and closing arguments. *State v. Ballew*, 76 Ohio St.3d 244, 255, 1996-Ohio-81. "The test for prosecutorial misconduct is whether the remarks were improper and, if

so, whether they prejudicially affected substantial rights of the accused. *State v. Bey*, 85 Ohio St.3d 487, 494, 1999-Ohio-283. The focus of that inquiry is on the fairness of the trial, not the culpability of the prosecutor. Id. at 495. In determining whether the prosecutor's remarks were prejudicial, the state's argument must be viewed in its entirety." *Ballew*, at 255.

{¶ 61} R.C. 2901.01(A)(3) defines "physical harm" as "any injury, illness or other physiological impairment, regardless of its gravity or duration." The State fails to cite any authority for its contention that feeling fear equates to physical harm. This court has been unable to find any support for this argument. Indeed, all authority we have found, albeit in the realm of civil law, has indicated that emotional stress is not a physical harm. See, e.g., *Blatnick v. Avery Dennison Corp.*, 148 Ohio App. 3d 494, 512, 2002-Ohio-1682, ¶95. Furthermore, our reading of the definition of "physiological" set forth by the State in its argument does not support its claim. Simply put, there is no indication that the legislature intended to include being afraid in its definition of physical harm. Therefore, we conclude that the prosecutor acted improperly in providing the jury with an incorrect theory of law.

{¶ 62} We next must determine whether this misconduct was prejudicial to Collier. In this case, the trial court instructed the jury that in order to find Collier guilty, it must find that he knowingly caused or attempted to cause physical harm. In light of the prosecutor's argument, the jury was given two alternate theories for conviction: (1) that Collier actually caused physical harm by causing the victim to feel fear; or (2) that Collier attempted to cause physical harm. Of these two theories, only one is legally correct. As stated above, there is no support for the

theory that Collier actually caused physical harm.

{¶ 63} Furthermore, when the trial court overruled Collier's objections to this line of argument it implicitly advised the jury that the State's argument – that fear equals physical harm – was correct. In light of the fact that Collier was convicted in a general verdict, it is impossible to discern whether the jury found physical harm or whether it convicted on the theory of attempted physical harm. Therefore, we cannot say that Collier was not prejudiced.

{¶ 64} Collier's Fourth Assignment of Error is sustained.

VI

{¶ 65} Collier's Fifth Assignment of Error states as follows:

{¶ 66} "THE CONVICTION SHOULD ALSO BE REVERSED BASED ON ANOTHER INSTANCE OF MISCONDUCT."

{¶ 67} Collier contends that his conviction should be reversed because the prosecutor referred to her personal belief during the rebuttal portion of the State's closing argument. Collier argues that the statement "ignores and subverts the notion that a defendant must be proved guilty beyond a reasonable doubt[, and] that even if the jury was inclined to find one or more of the elements of the offense unproved, they could rest assured that the prosecutor, employed by the state, would impose liability anyway."

{¶ 68} The statement to which Collier objects is as follows:

{¶ 69} "Personally, I feel if you shoot somebody and you shoot a bullet wherever it lands, you're responsible for it."

{¶ 70} Collier failed to object to this statement. Therefore, absent plain error, he has waived this argument for appeal. After reviewing the entire closing argument, we note that this statement was merely one sentence out of numerous pages of transcript. While we agree that counsel should not have made this statement, we conclude that it does not rise to the level of plain error.

{¶ 71} Collier's Fifth Assignment of Error is overruled.

VII

{¶ 72} Collier's Fourth Assignment of Error having been sustained, the judgment of the trial court is Reversed, and this cause is Remanded for a new trial.

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BROGAN, P.J., and WOLFF, J., concur.

Copies mailed to:

Johnna M. Shia
Jon Paul Rion
Hon. Mary Kate Huffman