[Cite as *State v. Porter*, 2009-Ohio-2547.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO

Plaintiff-Appellee

v.

ULYSSES MARTEESE PORTER

Defendant-Appellant

Appellate Case No. 22923

Trial Court Case No. 08-CR-1081

(Criminal Appeal from
Common Pleas Court)

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O P I N I O N

Rendered on the 29th day of May, 2009.

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FAIN, J.

{¶ 1} Defendant-appellant Ulysses Marteese Porter appeals from his conviction and sentence, following a jury trial, on one count of Felonious Assault, in violation of R.C. 2903.11(A)(1). Porter's assigned appellate counsel could find no potential assignments of error having arguable merit, and filed a brief to that effect, under the authority of *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493. We have accorded Porter the opportunity to file his own, pro se brief, but he has not done so. We have performed our duty to review the record independently, and we find no potential assignments of error having arguable merit. Therefore, the judgment of the trial court is Affirmed.

I

{¶ 2} As a preliminary matter, we must note that for reasons that are not presently clear, there are in our record two transcripts of this trial, made from the video recording, by two different transcribers. One was filed in the office of the clerk of both the trial court and this court on November 3, 2008, with Megan Elswick signing as the transcriber. The other was filed in the office of the clerk of both the trial court and this court on November 10, 2008, with Cathie Collins signing as the transcriber.

{¶ 3} In performing our independent duty to review the record, we have read the entirety of the later-filed transcript, signed by Collins. We have performed a few spot-check comparisons of the two transcripts, and have found no discrepancies except for minor discrepancies that appear to be the result of transcription errors. Because we have determined that the earlier-filed transcript, signed by Elswick, appears to be substantially duplicative of the later-filed transcript, signed by Collins, we have not read any significant portion of the earlier-filed transcript.

{¶ 4} A CD-ROM video transcript of the June 6, 2008 hearing on Porter's motion to suppress statements he made to an investigating law enforcement officer was filed herein on May 5, 2009. Although no written transcript of that hearing has been filed, we have watched the entirety of the motion to suppress hearing.

II

{¶ 5} On March 13, 2008, Porter was living with his girlfriend, Kelsey Roberts, at her apartment in Harrison Township, Montgomery County, Ohio. A friend of Porter's, Benjamin Hoskin, was staying with them.

{¶ 6} Roberts had two children, but they were not at the apartment at the time of the offense. Roberts was pregnant with Porter's child. The couple had been at odds with each other, arguing for several days before this offense.

{¶ 7} During the night, Porter had been playing a game, using the television set in the adult bedroom, where he was. Roberts was in the children's bedroom, trying to sleep. Hoskin was sleeping downstairs on the sofa. Porter was playing music, as an accompaniment to the game, which was annoying to Roberts. Around 7:00 in the morning, she came into the bedroom and turned it down. Porter turned it back up; she pulled the plug on the television, killing the noise.

{¶ 8} Porter told Roberts he wanted her to give him a ride to his job. She declined, and told him that she wanted him out. She said that when he got back from work she would have his things outside for him to take with him. She did not think he had taken his role as the father of the unborn child seriously enough, apparently as a result, at least partially, of an incident where he had declined to accompany her to see a doctor.

{¶ 9} What happened next is disputed in one important particular. What is not disputed is that Porter bit Roberts on the cheek, tearing a chunk of flesh from her cheek. Michael Lakes, the emergency room doctor who treated Roberts, described the injury as follows:

{¶ 10} "Q. Can you describe what we are looking at? I mean obviously I can tell that this is a wound to the face, but the actual physical what we are looking there underneath the skin?

{¶ 11} "A. Well, mostly what you are seeing right there is blood and then the yellow that is poking through there is the subcutaneous fat. That is the fat that is underneath the skin. So, the bite has gone all the way through the skin into the subcutaneous tissue. It does not look like any muscle is exposed, but it is a fairly deep bite.

{¶ 12} "Q. How many human bites have you seen in your practice?

{¶ 13} "A. I would probably see about one a month would be an average.

{¶ 14} "Q. So it is somewhat common?

{¶ 15} "A. It is fairly common.

{¶ 16} "Q. More than what you might think?

{¶ 17} "A. More than the average person might think.

{¶ 18} "Q. Are you able to rate, rate might not be the proper medical term, but for lack of a better word, are you able to rate the severity of this injury?

{¶ 19} "A. Well, in my experience most human bites will just leave obvious tooth marks almost like a bruise. Sometimes they will tear the skin, but usually unless it is a large dog or something like that, you do not get this amount of tissue loss. I would say this is the most severe human bite that I have seen.

{¶ 20} "Q. This is not a superficial bite?

{¶ 21} "A. No.

{¶ 22} "Q. I don't know if you [sic] able to, but are you able to give the jury an idea of what it would take to bite through human flesh to that extent?

{¶ 23} "A. As you know, the teeth are not a sharp instrument like a knife so any time you have anything that is not incredibly sharp, you have to have more force of life [sic – the other transcript uses the word "applied" in place of "of life." See Part I, above.] So I think this would take a great deal of force to cause this amount of injury."

{¶ 24} Two photographs taken of the injury to Roberts's cheek before she was transported to the hospital for treatment were admitted in evidence. We have looked at them, and they are consistent with Doctor Lakes's testimony.

{¶ 25} After Roberts was bitten, she went next door to a neighbor's apartment, a 911 call was placed, and paramedics, sheriff's deputies, and an evidence technician responded. Roberts told her neighbor, a paramedic, a sheriff's deputy, and Doctor Lakes, that she had been bitten by her boyfriend. She said nothing about having threatened him with a knife before she was bitten.

{¶ 26} More than one sheriff's deputy and an evidence technician searched Roberts's apartment. Porter had left, with his friend Hoskin, taking Roberts's car, which she had allowed him to use. The sheriff's deputies and the evidence technician did not find a knife in the bedroom where the altercation had occurred, although they admitted that they were not specifically looking for a knife.

{¶ 27} Porter was apprehended in Springfield, Ohio, where he had taken Hoskin. He had previously talked to Detective Chad Begley, of the Montgomery County Sheriff's Office,

on Porter's cell phone, and although he lied to Begley about his whereabouts, claiming that he was in Huber Heights, when he actually was in Springfield, he was otherwise co-operative, and agreed to turn himself in.

{¶ 28} Porter agreed to give a statement, after having been advised of his rights under *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694. Porter's written statement was received in evidence. It is as follows:

{¶ 29} "At around 5:45 a.m. I woke up took a shower fix me some coffee. After that around about between 7 & 8 a.m. Kelsey was in the room getting dress [sic]. I asked her if she was taking me to work she said, no so I call my bossman and asks him to pick me up from Sunco [sic, "Sunoco" may have been intended]. She said when I get off work, my things will be pack [sic]. I said, for what and Kelsey said, she's tried [sic] of my ways and she's leaving me. At that time, I was playing some music she unpluged [sic] the T.V. so then she started talking about I don't love my baby she's carrying but I said I do. So she's walking around the house going off on me, so I grab her hands trying to talk (calm) to her by giving her some sugar (kiss) but she I guess move and I made a mistake by bitting [sic] her, I didn't try to bite her like that but when I saw all that blood I freaked out and left taking my friend back to Springfield. I know what I did was wrong and I'm so sorry and torn from what I did to 'Kelsey Margie [? middle name is hard to read] Roberts.' I know I will never see my unborn child again. I'm very so sorry [sic] about what I did, I love her and wish the Courts will forgive me for actions that I did this morning." (Parenthesized words in original.)

{¶ 30} Neither in Porter's written statement nor in anything he said to the investigating officers did he mention Roberts's having threatened him with a knife before he bit her.

{¶ 31} Roberts also gave a written statement to the investigating officer that was admitted in evidence. Nowhere therein did she mention having threatened Porter with a knife before having been bitten.

{¶ 32} As the reader will no doubt have surmised, Porter's defense at trial was that he was acting in self-defense when he bit Roberts, Roberts having threatened him with a knife. Porter, his friend Hoskin, and Roberts all testified in Porter's defense, and all three testified that Roberts was waving a large knife in Porter's direction, in a threatening manner, when Porter grabbed her arms, the two of them began to fall onto the bed, and Porter bit Roberts while they were falling.

{¶ 33} Porter produced a knife that Roberts testified she had found between a dresser and the bed when she returned to her apartment about a week after the offense. Porter was unsure when Roberts relinquished control of the knife, but Roberts and Hoskin both testified that it was when Porter bit Roberts – that Roberts dropped the knife at that time.

{¶ 34} Roberts and Porter testified that a number of knives were kept in the bedroom. Roberts testified as follows:

{¶ 35} "Q. Let me ask you back on March 13, 2008, were there knives upstairs?

{¶ 36} "A. Yes, a lot.

{¶ 37} "Q. Where were they?

{¶ 38} "A. Two in the closet which would be his closet. There was one in my closet at the top shelf. One on the nightstand on each side of the bed. One under the bed and one underneath the television.

{¶ 39} "Q. Is there a reason why there were so many knives?

{¶ 40} "A. Because I stay in Northland and that is not the best place to live. You never know if somebody is going to break in or something is going to happen. I cannot keep a gun or anything like that. I have to keep something up there in case somebody walks up my stairs or something like that. Also we used to eat up there so there were knives left from that as well."

{¶ 41} Curiously, neither the sheriff's deputies nor the evidence technician noticed any knives when they were looking around the bedroom after the incident. They did admit that they were not looking specifically for a weapon.

{¶ 42} Porter and Roberts explained the fact that nothing was brought up about the knife for months by explaining that they were both afraid that Roberts might go to jail if it came out that she had threatened Porter with a knife. They both testified that there had been one telephone conversation between them while Roberts was being treated at the hospital, during which the undesirability of bringing up the subject of the knife was discussed, at least by implication.

{¶ 43} Porter was arrested and later charged by indictment with Felonious Assault. He moved to suppress evidence of, or resulting from, statements he made to police officers. This motion was overruled after a hearing. Porter was then tried by a jury. His counsel told the trial court that Porter wished to have the jury instructed concerning the defense of self-defense, but did not wish to have the jury instructed concerning the lesser charge of Aggravated Assault. The jury was instructed concerning the defense of self-defense.

{¶ 44} At the conclusion of the trial, the jury found Porter guilty as charged, a judgment of conviction was entered, and he was sentenced to imprisonment for a term of

five years. From his conviction and sentence, Porter appeals.

III

{¶ 45} Porter's assigned appellate counsel has filed a brief under the authority of *Anders v. California*, supra, indicating that he could find no potential assignments of error having arguable merit. He set forth as one potential assignment of error that: "The trial court erred in not entering an acquittal as a matter of law because Appellant met his burden for the affirmative defense of self defense by a preponderance of the evidence."

{¶ 46} We agree with appellate counsel that this potential assignment of error has no arguable merit. Even if the jury were otherwise inclined to believe that Porter's having bit a chunk of flesh from Roberts's cheek would have been a justified use of force in response to his honest belief that he was in imminent danger of bodily harm from a knife being wielded by Roberts, a reasonable jury would certainly have been justified, upon this record, in rejecting the factual predicate for that affirmative defense. That is, a reasonable jury could have found, from the evidence in this record, that there was no knife – that the defense of self-defense was a story concocted by Porter, Roberts, and Porter's friend, Hoskin, to keep Porter, the father of Roberts's soon-to-be-born child, from going to prison, and thereby becoming unavailable to assist Roberts in raising the child. The lack of any reference to a knife by Porter or Roberts in their statements to police and health care professionals after the incident (even though they offered an explanation for that) and the fact that no knife was observed by the sheriff's deputies and evidence technician who looked around the bedroom where the biting occurred (even though they were not specifically looking for a weapon), would permit a reasonable jury to conclude that there

was no knife.

{¶ 47} In conducting our independent review of the record, we have found no potential assignments of error having arguable merit.

{¶ 48} Porter did object to the admission in evidence of two photographs of Roberts's injury, but they were reasonably necessary to prove that the extent of the injury satisfied that element of Felonious Assault. Porter also objected to the State's having shown the jury these photographs in its opening statement, but they were going to be admitted in evidence, and there is nothing in the record to indicate that the State made undue use of the photographs in opening statement in order to inflame the jury.

{¶ 49} Isaiah Kellar, the evidence technician who took the photograph, testified at one point as follows:

{¶ 50} "Q. Why was it so important for you to get a photograph of her at the hospital?

{¶ 51} "A. It's important to take injuries, victims especially in domestic violence type cases because in certain cases they will change their stories if it's against a loved one."

{¶ 52} There was no motion to strike this answer. Perhaps a motion to strike would have been granted, especially if Kellar lacked a reasonable foundation for testifying about the tendency of domestic violence victims to "change their stories," but it is not certain that a motion to strike would have been granted. Defense counsel, who was experienced, may reasonably have decided not to move to strike, which would only have emphasized this point to the jury by indicating that this testimony was sufficiently prejudicial to be worth a motion to strike. In any event, most jurors could be expected to understand that a victim of a violent act performed by a loved one might have a motive for excusing or for mitigating

the loved ones conduct. We see no reasonable probability that an assignment of error based upon this exchange, asserting ineffective assistance of counsel, would lead to a reversal.

{¶ 53} In general, the record portrays an experienced defense counsel doing the best he can with a case made difficult by the horrific nature of the injury and the weaknesses of the self-defense theory to which we have previously alluded.

{¶ 54} In the conference concerning jury instructions, defense counsel indicated that he had consulted with Porter about whether to seek an instruction on Aggravated Assault, but that they had both concluded that the requirement, for Aggravated Assault, of a sudden fit of passion or rage in response to provocation did not fit their theory of the facts – that the affirmative defense of self-defense best fit their theory of the facts – and that they desired an instruction on self-defense, and no instruction on Aggravated Assault. The trial court gave the instructions in accordance with the expressed wishes of Porter and his counsel. Since the record reflects that Porter was involved in this decision, it is unlikely that the record could be deemed to portray ineffective assistance of counsel on this point. Even if it theoretically could, we see no reasonable argument to be made, on this record, that counsel's advice on the undesirability of an instruction on Aggravated Assault constitutes ineffective assistance of counsel. The thinking of counsel reflected in the record appears to us to be entirely reasonable, in view of the evidence presented by the defense.

IV

{¶ 55} We have found no potential assignments of error having arguable merit. Accordingly, we conclude that this appeal is wholly frivolous. The judgment of the trial

court is Affirmed.

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GRADY and FROELICH, JJ., concur.

Copies mailed to:

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