[Cite as *State v. Miller*, 2009-Ohio-4607.]

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

STATE OF OHIO	:	
	:	Appellate Case No. 22433
Plaintiff-Appellee	:	
	:	Trial Court Case No. 06-CR-776
v.	:	
	:	(Criminal Appeal from
THERESA MILLER	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 4th day of September, 2009.

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FAIN, J.

{¶ 1} Defendant-appellant Theresa Miller appeals from her conviction upon two counts of Murder and one count of Tampering with Evidence. Miller argues that the jury instructions on each count of the indictment and on the inferior offense of Voluntary Manslaughter were so erroneous and misleading that they deprived her of

her rights to due process and a fair trial and amounted to both plain error and structural error. She insists that her trial counsel was ineffective for failing to object to those instructions. Miller also contends that she was forced to give up her Fifth Amendment right to remain silent by the trial court's ruling that required her to put on testimony in support of her claim of self-defense before she could offer expert testimony regarding battered woman syndrome. We conclude that the trial court's instructions on the Murder and Tampering with Evidence charges were sufficient and that, because she did not offer sufficient evidence to warrant an instruction on Voluntary Manslaughter, any error in those instructions was harmless. We also conclude that Miller was not denied the effective assistance of trial counsel and that she was not deprived of her right to remain silent.

I

{¶ 2} Shortly after midnight on February 21, 2006, Theresa Miller killed her boyfriend Kevin Beculheimer by stabbing him in the neck and back thirty-one times with an 8-inch hunting knife. She then hid the knife and went across the road to a neighboring apartment, where she asked the couple to come over and take a look at something. The woman refused, but the man accompanied Miller and saw Beculheimer's body face down on the floor; Beculheimer did not appear to be breathing. The neighbor immediately returned to his own apartment to call 9-1-1.

{¶ 3} During the call, the neighbor gave the phone to Miller, who told the operator that she and Beculheimer had an argument, and she left the apartment. She claimed that she returned about thirty minutes later and found Beculheimer on

the floor, covered in blood. Miller said, "somebody came in. I have no idea." Police arrived and found Beculheimer's dead body on the floor of his home. They found the murder weapon hidden in mulch and leaves under the bushes in front of his apartment. Miller told the officers who responded to the scene and Detective Ward the same story she had told the operator. She insisted that the detective should "look into all the crackheads in the neighborhood." During a second interview with Detective Ward, Miller continued to deny killing Beculheimer, calling him a foul name and stating, "I'm not gonna be hit anymore."

{¶ 4} Another neighbor, who was moving in next door to Beculheimer, testified that she observed Miller and Beculheimer arguing on the afternoon before his murder. A couple of hours later, she overheard Miller angrily complaining that Beculheimer would not give her money for beer. Shortly before Beculheimer's murder, that neighbor heard loud music and arguing coming from Beculheimer's apartment.

{¶ 5} Three of Beculheimer's stab wounds would have been immediately fatal: two severed his spinal cord at his brain stem, and one punctured his lung, allowing his chest cavity to fill with blood. Beculheimer had no defensive wounds; all of his injuries were to his neck and back. Miller had no visible injuries beyond a small cut on her hand.

{¶ 6} Miller was indicted on two counts of Murder and one count of Tampering with Evidence. At trial Miller admitted that she stabbed Beculheimer, but claimed that she killed him in self-defense.

{¶ 7} Miller testified that on the night of Beculheimer's death, the couple had

been arguing. At one point, Beculheimer told her to leave the apartment. When she tried to do so, he slammed the door closed, pushed her to the floor, and began hitting her in the sides and arms. She claimed that as she struggled to get away, she saw a knife on the floor and grabbed it, stabbing Beculheimer. Miller claimed only to remember having stabbed Beculheimer one time.

{¶ 8} Miller testified to Beculheimer's abuse of her during the course of their nineteen-year relationship. Miller also called as witnesses her mother and friends, who had either seen injuries on her and/or had witnessed instances of abuse. She also presented expert testimony about Battered Woman Syndrome. In addition to an instruction on self-defense, Miller sought, and the trial court gave, an instruction on the inferior offense of Voluntary Manslaughter.

{¶ 9} A jury convicted Miller as charged. The trial court merged the two Murder convictions into one, and sentenced Miller to an aggregate sentence of seventeen years to life in prison. Miller appeals.

II

{¶ 10} Miller's First Assignment of Error is as follows:

{¶ 11} "INACCURATE, INCOMPLETE, AND MISLEADING JURY INSTRUCTIONS DEPRIVED APPELLANT OF A FAIR TRIAL AND DUE PROCESS OF LAW."

{¶ 12} In her First Assignment of Error, Miller maintains that the trial court's instructions to the jury on each charge of the indictment and on the inferior offense of Voluntary Manslaughter were so erroneous and misleading that they deprived her of

her constitutional rights to due process and a fair trial. Miller acknowledges that counsel failed to object to the instructions and that she has, therefore, forfeited all but plain error. *State v. Underwood* (1983), 3 Ohio St.3d 12, syllabus, *State v. Long* (1978), 53 Ohio St.2d 91, approved and followed. Miller claims that the instructional errors not only rise to the level of plain error, but that the errors "were so pervasive, and affected so many different aspects of this case, that, either individually or collectively they should be deemed as 'structural error,' requiring automatic reversal."

{¶ 13} Challenged jury instructions may not be reviewed individually, but must be reviewed within the context of the entire charge. *Long,* supra, citing *State v. Hardy* (1971), 28 Ohio St.2d 89. For the following reasons, we conclude that when evaluating the jury instructions as a whole, the instructions in this case did not rise to the level of either plain error or structural error.

{¶ 14} Initially, we note that much of Miller's argument against the trial court's jury instructions centers on comparisons between those instructions and the models provided by Ohio Jury Instructions. However, strict compliance with those model instructions is not mandatory; a trial court is not required to "slavishly follow form instructions." *State v. Lollis* (March 3, 1993), Clark App. No. 2897, citation omitted. Instead, the instructions are "recommended instructions *** crafted by eminent jurists to assist trial judges with correctly and efficiently charging the jury as to the law applicable to a particular case." *State v. Martens* (1993), 90 Ohio App.3d 338, 343. Deviation from the model instructions does not necessarily constitute error by the trial court.

{¶ 15} Criminal Rule 52(B) provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Long,* supra, at paragraph three of the syllabus. In the context of jury instructions, the Ohio Supreme Court has held that failure to "separately and specifically instruct the jury on every essential element of each crime with which an accused is charged does not per se constitute plain error," but that under such circumstances plain error review requires the examination of the record in each individual case. *State v. Adams* (1980), 62 Ohio St.2d 151, 154, and at paragraph two of the syllabus.

{¶ 16} Structural errors, on the other hand, are errors that affect the very framework of the trial, permeating the conduct of the trial from beginning to end, to the point that the trial cannot be a reliable means of determining guilt or innocence. *State v. Perry,* 101 Ohio St.3d 118, 2004-Ohio-297, ¶17, citations omitted. However, unlike a plain-error analysis, the structural-error analysis is not to be applied on a case-by-case basis. *State v. Colon,* 119 Ohio St.3d 204, 2008-Ohio-3749, ¶13. Instead, "structural-error analysis is applied when a particular error permeates the trial and renders it fundamentally unfair in *every* case, such that, when the error occurs, 'no criminal punishment may be regarded as fundamentally fair.'" Id., quoting *Rose v. Clark* (1986), 478 U.S. 570, 577, 106 S.Ct. 3101.

{¶ 17} Miller begins by challenging the court's instructions on the two Murder charges under R.C. 2903.02(B). Both charges require proof that the accused caused the death of another as a proximate result of committing an "offense of

violence." In Count I of the indictment, the underlying offense of violence was Felonious Assault causing serious physical harm under R.C. 2903.11(A)(1), and in Count II, the offense was Felonious Assault with a deadly weapon under R.C. 2903.11(A)(2). Miller argues that although the trial court defined the elements of Felonious Assault, the court failed to instruct the jury as to what constitutes Felonious Assault.

{¶ 18} As to Count I, the court charged, "you must find beyond a reasonable doubt that on or about the 21st day of February, 2006, [in] Montgomery County, Ohio the Defendant, Theresa Miller, did cause the death of another, that being Kevin Beculheimer, as a proximate result of the offender committing the offense of Felonious Assault involving serious physical harm." In Count II, the court charged that the jury must find that, "on or about the 21st day of February, 2006, Theresa Miller, in Montgomery County, did cause the death of another, that is Kevin Beculheimer, as a proximate result of the offender committing the offense of Felonious Assault in relation to the use of a deadly weapon." The court then defined the words "cause" and "knowingly."

{¶ 19} Miller contends that the court's next step should have been to specifically define Felonious Assault under R.C. 2903.11(A)(1) as knowingly causing serious physical harm to another and Felonious Assault under R.C. 2903.11(A)(2) as knowingly causing or attempting to cause physical harm to another by means of a deadly weapon, before the court explained the terms contained therein. While the court did not do so, the court did define the relevant terms of "serious physical harm," "physical harm," and "deadly weapon." Having already defined "knowingly" and

"cause," the court's instructions, taken as a whole, were sufficient. While the better practice would be to specifically define both Felonious Assault and its elements, we find no error in this case in merely labeling the crime and then defining its elements. The instructions given, while perhaps not ideal, were sufficient to apprise the jury of the elements required for the commission of each of the two types of Murder charged.

{¶ 20} Per Miller's request, the court also instructed the jury on the inferior offense of Voluntary Manslaughter. Miller claims that the trial court erred in its instruction on that charge in several respects. First, she asserts that the court omitted the mens rea element of "knowingly." Miller points out that the court repeatedly misstated the name of the offense as Involuntary Manslaughter, and she argues that the court compounded that error by improperly treating the Voluntary Manslaughter charge as a lesser included offense in its instructions. Miller concludes that the erroneous instructions on this charge had the effect of instructing the jury to disregard the inferior offense if it found that the elements of Murder had been proven.

{¶ 21} We are troubled by the trial court's repeated mislabeling of the charge as Involuntary Manslaughter rather than Voluntary Manslaughter. We are similarly troubled by the court's inaccurate identification of Voluntary Manslaughter both as an affirmative defense and as a lesser-included offense, when in fact, Voluntary Manslaughter is an inferior degree of Murder. See, e.g., *State v. Davis,* Montgomery App. No. 21904, 2007-Ohio-6680, ¶21, citing *State v. Shane* (1992), 63 Ohio St.3d 630, 632. However, we are most concerned about the trial court's instructions that

the jury was to consider the Voluntary Manslaughter charge only if they first found "that the State has failed to prove beyond a reasonable doubt all the essential elements of the offense of Murder" and if they were "unable to agree on a Verdict of either Guilty or Not Guilty on the greater offense, that is the Murder charge." Clearly, this is a misstatement of the law because "'[a]n offense is an 'inferior degree' of the indicted offense where its elements are identical to or contained within the indicted offense, except for one or more additional mitigating elements.'" *State v. Franklin,* 97 Ohio St.3d 1, 2002-Ohio-5304, ¶73, quoting *State v. Deem* (1988), 40 Ohio St.3d 205, paragraph two of the syllabus.

{¶ 22} Before we consider the possible effect of the erroneous instruction on the inferior offense of Voluntary Manslaughter, we must first consider whether a Voluntary Manslaughter instruction was warranted. Voluntary Manslaughter is proscribed in R.C. 2903.03(A), which states as follows: "No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly cause the death of another...." The Ohio Supreme Court has repeatedly cautioned that a trial court need not give the instruction every time "some evidence" is presented going to the inferior degree offense. *Shane,* supra, at 633. See, also, *State v. Conway,* 108 Ohio St.3d 214, 2006-Ohio-791, ¶34; *State v. Robb,* 88 Ohio St3d 59, 74, 2000-Ohio-275. To require the instruction to be given every time there is "some evidence," however minute, would mean that no trial judge could ever refuse to instruct on the inferior degree offense. Id.

{¶ 23} When considering whether to give an instruction on Voluntary Manslaughter, the trial court must employ a two-part analysis. "In determining whether the provocation is reasonably sufficient to bring on sudden passion or a sudden fit of rage, an objective standard must be applied. Then, if that standard is met, the inquiry shifts to the subjective component of whether this actor, in the particular case, actually was under the influence of a sudden passion or in a sudden fit of rage. It is only at that point that the '*** emotional and mental state of the defendant and the conditions and circumstances that surrounded [her] at the time ***' must be considered." *Shane,* supra, at 634, quoting *Deem*, supra, at paragraph five of the syllabus.

{¶ 24} Miller explained that she and Beculheimer had argued that evening, and he told her to leave. She testified, "I turn around and I open the door. And he was behind me, and he closed the door *** and then he pushed me to the floor and got on top of me. *** he started hitting me here -- [indicating] -- but I put my arms up *** trying to protect my face. *** And so he was hitting me in my sides *** and on my arms. I tried to roll over on my stomach so I can get out from underneath him. *** I was tryin' to scoot my way out from under. That's when I seen the knife on the floor. *** I grabbed it. *** I'm trying to get out from underneath him. *** I get on my back. *** He's still on top of me. *** I thought he put that knife down there to use it on me. I thought he was gonna kill me. *** I was swinging the knife." Notably absent from Miller's testimony is any description of the force with which Beculheimer "pushed" her to the floor, the force with which he was "hitting" her on her sides and arms, or even the number of times he hit her.

{¶ 25} Extensive testimony was offered by Dr. Bromberg, most of which was not directly related to the events immediately preceding Beculheimer's death. When his testimony is applied to the objective prong of the test for the appropriateness of the Voluntary Manslaughter instruction, it offers little more than Miller's own testimony. Regarding those events, Dr. Bromberg repeated Miller's claims that Beculheimer "pushed" her and started "hitting" her. He adds that Miller was scared by the "look in his eye," which she compared to Jack Nicholson's face in the movie "The Shining." Dr. Bromberg also testified that Beculheimer "had began squeezing her legs harder than he had ever done it before."

{¶ 26} "'For provocation to be reasonably sufficient, it must be sufficient to arouse the passions of an ordinary person beyond the power of his or her control.'" *State v. Elmore,* 111 Ohio St.3d 515, 2006-Ohio-6207, ¶81, quoting *Shane,* supra, at 635. Beculheimer's behavior, as set forth in both Miller's testimony and Dr. Bromberg's, although reprehensible, does not amount to serious provocation that is reasonably sufficient to provoke an ordinary person to use deadly force. Therefore, the objective prong was not met; the trial court did not need to proceed to the subjective prong, and the court should have refused to give the Voluntary Manslaughter instruction. *Shane,* supra, at 631-32. Furthermore, because the instruction on Voluntary Manslaughter should not have been given, any error in the giving of that instruction was harmless. See, e.g., *State v. Durkin* (1981), 66 Ohio St.2d 158, 160-61. See, also, *State v. Battle* (May 2, 1990), Montgomery App. No. 10823 (erroneous jury instruction on Entrapment was harmless because there was insufficient evidence to warrant the instruction); *State v. Amison,* Cuyahoga App. No.

86279, 2006-Ohio-560 (erroneous jury instruction on Voluntary Manslaughter was harmless because there was insufficient evidence to warrant the instruction), citing *Franklin,* supra.

{¶ 27} Finally, Miller insists, without explanation, that the trial court's instruction on the Tampering with Evidence charge was deficient because it failed to include a definition of "knowing" and because the court did not give a complete instruction on the mental state of "purpose." Because the court did define the word "knowingly" in the context of the Murder instructions, the court's failure to repeat this information was not error. Additionally, the court did give an adequate definition of the word "purpose," and Miller fails to specify what more should have been included in that instruction. Accordingly, we find no error in the court's instructions in regard to the Tampering with Evidence charge.

{¶ 28} In conclusion, when all of the jury instructions given by the trial court are considered as a whole, the instructions on the charge of Murder, although inartful, did not amount to either plain or structural error. We find no error in the court's instruction on the Tampering with Evidence charge. Furthermore, although the court's instructions on Voluntary Manslaughter were incorrect, this error is harmless because Miller failed to offer sufficient evidence of provocation to warrant the giving of the instruction.

{¶ 29} Miller's First Assignment of Error is overruled.

III

{¶ 30} Miller's Third Assignment of Error is as follows:

{¶ 31} "APPELLANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL."

{¶ 32} In her Third Assignment of Error, Miller insists that her trial counsel was ineffective for failing to object to the jury instructions. In order to prevail on a claim of ineffective assistance of counsel, the defendant must show both deficient performance and resulting prejudice. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. Trial counsel is entitled to a strong presumption that his conduct falls within the wide range of effective assistance, and to show deficiency the defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness. Id.

{¶ 33} We have held, in Part II, above, with regard to Miller's First Assignment of Error, that there was no error in the trial court's instructions on the charges of Murder or Tampering with Evidence, and that any error in the instruction on the Voluntary Manslaughter charge was harmless. Therefore, we can not conclude that Miller's attorney was ineffective for failing to object to the jury instructions.

{¶ 34} Miller's Third Assignment of Error is overruled.

IV

{¶ 35} Miller's Second Assignment of Error is as follows:

{¶ 36} "APPELLANT'S CONSTITUTIONAL RIGHT AGAINST SELF-INCRIMINATION WAS VIOLATED AS A RESULT OF THE COURT'S RULING WITH REGARD TO EXPERT EVIDENCE OF BATTERED WOMAN SYNDROME."

{¶ 37} In her Second Assignment of Error, Miller contends that she was

deprived of her Fifth Amendment right to remain silent by the trial court's ruling requiring her to present evidence to support her claim of self-defense before she could offer evidence of battered woman syndrome relevant to that claim. Miller wanted to begin her case-in-chief with the testimony of Dr. Richard Bromberg, who was to testify that he met with Miller during the months of June and July, 2006, during which Miller described the history of abuse that she suffered from Beculheimer during the course of their relationship, including the events on the night of the murder. Miller intended Bromberg's testimony both to introduce evidence of Beculheimer's abusiveness and to conclude that at the time of the murder, she suffered from battered woman syndrome, which affected her belief regarding the danger to her life on that night.

{¶ 38} The State objected to the admission of Miller's hearsay statements through Bromberg, arguing that R.C. 2901.06 requires a defendant to present evidence asserting a claim of self-defense prior to the admission of expert testimony on battered woman syndrome. In accordance with the statute, the court refused to allow Bromberg's testimony absent some independent showing by Miller raising a claim of self-defense. Once Miller testified that she had killed Beculheimer in self-defense, Bromberg was permitted to testify. The only issue before us is whether the trial court's ruling forced Miller to testify, in violation of her Fifth Amendment privilege against self-incrimination. We conclude that it did not. The admissibility of evidence on the battered woman syndrome is governed by R.C. 2901.06, which provides in relevant part: "If a person is charged with an offense involving the use of force against another, and the person, as a defense to the

offense charged, raises the affirmative defense of self-defense, the person may introduce expert testimony of the 'battered woman syndrome' and expert testimony that the person suffered from that syndrome as evidence to establish the requisite belief of an imminent danger of death or great bodily harm that is necessary, as an element of the affirmative defense, to justify the person's use of the force in question. The introduction of any expert testimony under this division shall be in accordance with the Ohio Rules of Evidence." R.C. 2901.06(B). Thus, pursuant to the statute, expert testimony regarding battered woman syndrome is only admissible to support a claim of self-defense, not to establish one. See, e.g., *State v. Herdman* (Aug. 8, 2000), Delaware App. No. 99CA12067.

{¶ 39} Furthermore, because the burden of proving a claim of self-defense is on the defendant, it may be necessary for a defendant to testify in order to establish that defense. *State v. Seliskar* (1973), 35 Ohio St.2d 95, 96, citing *State v. Champion* (1924), 109 Ohio St. 281. By the very nature of a claim of self-defense, "no one is in a better position than the defendant to provide evidence to aid the jury in determining whether the defendant's acts were justified." Id. The Supreme Court of Ohio further explained that "[i]f a defendant cannot provide evidence on the issue of self-defense other than [her] own testimony, then, in order to avail [herself] of the defense, [she] must testify. In such event, the choice is that of the defendant, and, once [she] has decided to rely on self-defense and is required by the circumstances to testify in order to prove that defense, [she] necessarily must waive [her] constitutional right to remain silent." Id.

{¶ 40} The choice whether or not to testify was entirely Miller's. If she elected

to argue that she killed Beculheimer in self-defense, then the burden was on her to offer evidence in support of that claim. Simply because, in this case, that evidence could only be offered through Miller's own testimony does not equate with her being forced to testify. In other words, it was not the trial court's ruling that forced Miller to testify; it was her choice of defense strategy.

{¶ 41} Because Bromberg's testimony was not relevant to any issue in the case until Miller offered evidence of a claim of self-defense, the trial court did not abuse its discretion in refusing to allow his testimony until evidence of that defense was offered. The trial court's ruling on this issue did not serve to force Miller to abandon her constitutional rights.

{¶ 42} Miller's Second Assignment of Error is overruled.

V

{¶ 43} All of Miller's assignments of error having been overruled, the judgment of the trial court is Affirmed.

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BROGAN and FROELICH, JJ., concur.

Copies mailed to:

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