

[Cite as *State v. Davis*, 2004-Ohio-2618.]

**COURT OF APPEALS  
THIRD APPELLATE DISTRICT  
PAULDING COUNTY**

**STATE OF OHIO**

**CASE NUMBER 11-03-16**

**PLAINTIFF-APPELLEE**

**v.**

**OPINION**

**MARSHALL A. DAVIS**

**DEFENDANT-APPELLANT**

---

---

**STATE OF OHIO**

**CASE NUMBER 11-03-17**

**PLAINTIFF-APPELLEE**

**v.**

**OPINION**

**CHERYL DAVIS**

**DEFENDANT-APPELLANT**

---

---

**CHARACTER OF PROCEEDINGS: Criminal Appeals from Common Pleas Court.**

**JUDGMENTS: Judgments affirmed.**

**DATE OF JUDGMENT ENTRIES: May 24, 2004.**

---

---

**ATTORNEYS:**

**WILLIAM F. KLUGE**  
**Attorney at Law**  
**Reg. #0022433**  
**124 S. Metcalf Street**  
**Lima, OH 45801**  
**For Appellant.**

**JOSEPH R. BURKARD**  
**Prosecuting Attorney**  
**Reg. #0059106**  
**112 ½ North Water Street**  
**Paulding, OH 45879**  
**For Appellee.**

**CUPP, J.**

{¶1} Defendant-appellants, Marshall Davis and Cheryl Davis appeal the judgments of the Paulding County Court of Common Pleas, finding each appellant guilty of Assault on a Peace Officer in violation of R.C. 2903.13(A), a fourth degree felony; Obstructing Official Business in violation of R.C. 2921.31, a fifth degree felony; and Obstructing Justice in violation of R.C. 2921.32(A)(6), a fifth degree felony. Appellants were sentenced to community control sanctions.

{¶2} On March 15, 2003, at approximately 2:00 a.m., John Gray, an Ohio State trooper, began following a red Mustang. Trooper Gray turned on his lights, but instead of slowing to a stop, the Mustang accelerated and led the trooper on a high-speed chase reaching speeds of 125 m.p.h. through Paulding, Ohio. The driver of the Mustang finally stopped at appellants' residence. The driver was later identified as Craig Copsey (hereinafter "Copsey"), Cheryl's son and Marshall's stepson.

{¶3} The appellants had returned home from the Paulding VFW just prior to Copsey's arrival at their home with Trooper Gray following him. Cheryl noticed the red and blue flashing lights and heard a siren. She walked to the window, noticed a police cruiser in the driveway and told Marshall that the cruiser had stopped in front of their house.

{¶4} When Trooper Gray got out of his cruiser at appellants' residence, he attempted to subdue Copsey, but Copsey pulled away from him and began to walk toward the house. Trooper Gray followed, pulled his Taser gun and attempted to stop Copsey, but the Taser did not fire properly. Copsey continued into the garage of the residence and Trooper Gray ran after him. A struggle ensued and both men ended up wrestling on the floor of appellants' garage.

{¶5} Marshall and Cheryl followed Trooper Gray and Copsey into the garage. In response to a call by Trooper Gray, two deputies had also arrived and entered the garage. Trooper Gray continued his attempts to subdue and arrest Copsey, however, Marshall and Cheryl proceeded to interfere with the arrest by trying to push Trooper Gray out of the garage and away from Copsey. Trooper Gray testified that Cheryl was screaming at him to leave Copsey alone and to get out of her house. Trooper Gray continually told Marshall and Cheryl to get back. Appellants did not follow his instructions, however, and Trooper Gray sprayed them both with mace.

{¶6} Trooper Gray and the other two deputies continued to attempt to arrest Copsey, who continued to struggle. The three officers also attempted to control appellants' persistent interference with Copsey's arrest. At some point, Cheryl came at Trooper Gray with a rag in her hand and proceeded to wipe his face with it. The rag was subsequently found to have been used by Cheryl to clean off the mace after Trooper Gray had sprayed her. After another officer arrived from the Paulding Police Department, Marshall and Cheryl were finally subdued and Copsey was taken into custody.

{¶7} After Craig's arrest, he was transported to the Paulding Police Department where he met with his probation officer. In exchange for the promise that no charges would be brought against him, Craig subsequently began work as an undercover drug informant for the Paulding County Sheriff.

{¶8} Marshall and Cheryl were each indicted for Assault on a Peace Officer, Obstructing Official Business and Obstructing Justice. They were tried together and their cases proceeded to a jury trial on September 17-18, 2003. The jury found both Marshall and Cheryl guilty on all three counts.

{¶9} It is from this decision that appellants appeal. Marshall and Cheryl present identical assignments of error. Although the appeals of Marshall and Cheryl have not been consolidated by this court, we will treat them as such for purposes of this opinion and their assignments of error will each be considered together.

#### **ASSIGNMENT OF ERROR NO. I**

**The court erred in excusing Juror Kochel from the prospective panel without giving the appellant the opportunity to question the juror and rehabilitate him.**

{¶10} Appellants argue that the trial court erred in excusing for cause prospective juror Kochel, who had recently been arrested by Trooper Gray, before

affording defense counsel a chance to examine and possibly rehabilitate him. According to appellants, this act by the trial court was an abuse of discretion which requires reversal.

{¶11} “[T]he determination of whether a prospective juror should be disqualified for cause is a discretionary function of the trial court. Such determination will not be reversed on appeal absent an abuse of discretion.” *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169; see, also, *State v. Smith* (1997), 80 Ohio St.3d 89. An abuse of discretion connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Berk*, 53 Ohio St.3d at 169, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶12} R.C. 2313.42 states that “[a]ny person called as a juror for the trial of any cause shall be examined under oath or upon affirmation as to his qualifications. \* \* \*. The following are good causes for challenge to any person called as a juror: \* \* \* That he discloses by his answers that he cannot be a fair and impartial juror or will not follow the law as given to him by the court.” See R.C. 2313.42 (J). Each challenge for cause pursuant to R.C. 2313.42 is to be

considered as a principal challenge, and its validity tried by the court. *Zachariah v. Rockwell Internatl.* (1998), 127 Ohio App.3d 298, 300.

{¶13} Normally, an attorney should have a reasonable opportunity to supplement the Court's examination of prospective jurors. Crim. R. 24(A). In the case sub judice, the transcript reveals that the attorneys did in fact conduct extensive additional examination of the prospective jurors. The appellants claim, however, that the limitation on the examination of one prospective juror was sufficient to create such error as to require a new trial. We disagree.

{¶14} The alleged error occurred with regard to the examination of prospective juror Kochel. Upon the state's examination, it was revealed that Kochel had been previously involved in an incident with Trooper Gray. In that incident, Kochel had been arrested by Gray. The prosecutor asked Kochel, "Do you feel that you'd have a definite bias against Trooper Gray and what he may present as far as evidence because of your past?" Kochel responded, "Yes."

{¶15} After Kochel was challenged for cause by the prosecutor, the Court questioned Kochel to determine whether Kochel would be a fair and unbiased juror. The examination was as follows:

**Court: Mr. Kochel, the responsibility of a juror is to listen to the evidence that's solicited here in the courtroom, listen to the Court's instructions on what the law is on particular issues involved, and render a decision based solely upon that, solely upon the evidence that you hear here in the courtroom and the instructions given to you by the law. Do you believe you could do that?**

**Juror Kochel: Well, no, because I don't feel I was treated fairly.**

{¶16} The purpose of voir dire is to obtain a jury that is free from bias and prejudice against either party to the case and to seat as jurors only those who will be able to receive the evidence with an open mind before reaching a decision which is based on the evidence and the instructions from the court. Excusing Kochel as a juror upon his forthright statement that he did harbor bias against the state's key witness and main actor in the case, and concluding that Kochel could not discharge the duty of a fair and impartial juror in the case, was within the sound discretion of the trial judge. Although it may have been better practice to allow defense counsel to inquire upon the matter prior to excusing Kochel, it would not have been unreasonable for the court to excuse this prospective juror regardless of what may have been elicited by defense counsel since what the witness had already expressed was sufficient for the court to exercise its discretion and excuse the juror for the purpose of obtaining an unbiased jury.

{¶17} Accordingly, the appellants' first assignments of error are overruled.

## ASSIGNMENT OF ERROR NO. II

**The court erred in not giving to the jury the instructions requested by the appellant.**

{¶18} At the close of the trial, appellants proposed a number of additional jury instructions, which the trial court overruled. Appellants argue that the trial court erred in overruling their proposed instructions in that the proposed instructions were relevant to the appellants' action on the night Copsey was arrested. Specifically, the appellants assert that instructions on the affirmative defenses of mistake of fact and self defense of home were particularly important, considering appellants' testimony at trial. According to appellants, they had no idea who the people were in their garage or why they were fighting; the appellants were merely trying to get the two men out of their home.

{¶19} A trial court must fully and completely give only those instructions that are relevant and necessary for the jury to weigh all the evidence. *State v. Comen* (1990), 50 Ohio St.3d 206, paragraph two of the syllabus. Generally, if the requested jury instructions are correct statements of law applicable to the facts of the case, and reasonable minds may reach the conclusion sought, the trial court

should give the requested instructions. *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585, 591. On review, an appellate must determine whether the trial court abused its discretion in refusing an appellant's proposed instruction. *State v. Cisternino* (Mar. 30, 2001), Lake App. No. 99-L-137. After reviewing Marshall and Cheryl's proposed jury instructions, the trial court found they were not applicable to the facts of the case at bar. We agree.

{¶20} In addition to the jury instructions proposed by appellants regarding mistake of fact and self-defense of home, the appellants proposed affirmative defense instructions on the use of excessive force in arresting Copsey and on self-defense of another. The appellants also requested instructions on the lesser included offenses of misconduct in an emergency, failure to aid a law enforcement officer, and resisting arrest. In addition, the appellants requested other instructions regarding Trooper Gray's forcible entry in making arrest, the physical harm to Copsey and an instruction on appellants' character and reputation.

{¶21} First, we find that the proposed instruction regarding Trooper Gray's use of excessive force in arresting Copsey might provide Copsey, who was not on trial, with an affirmative defense, but not appellants. See *Cleveland v. Murad* (1992), 84 Ohio App.3d 317. Additionally, we do not find that mistake of fact

was available as an affirmative defense. Trooper Gray pulled up to appellants' home in his patrol car with lights flashing. Trooper Gray was dressed in uniform as were the other deputies who arrived on the scene. From the evidence presented, we do not find that reasonable minds could have reached the conclusion that appellants were mistaken as to the trooper's identity. Neither do we find the proposed instructions of self-defense of another, and self-defense of home to be available. The appellants' were not in danger from Trooper Gray nor was their home attacked by him. Furthermore, appellants would not have been justified in defending Copsey, as Copsey had given rise to the situation by fleeing from Trooper Gray and resisting arrest.

{¶22} Second, we do not find that misconduct in an emergency, failure to aid a law enforcement officer or resisting arrest are lesser included offenses of the offenses with which appellants were charged. "An offense may be a lesser included offense of another only if (i) the offense is a crime of lesser degree than the other, (ii) the offense of the greater degree cannot be committed without the offense of the lesser degree also being committed and (iii) some element of the greater offense is not required to prove the commission of the lesser offense."

*State v. Wilkins* (1980), 64 Ohio St.2d 382, 384. The offenses, as proposed by appellants in their jury instructions, do not meet these criteria.

{¶23} Regarding the proposed instruction on appellants' reputation and character, we find that this requested instruction was given to the jury. We further find that the other proposed instructions were inapplicable to the facts of the case before us.

{¶24} For the foregoing reasons, we do not find that the trial court abused its discretion in denying appellants' proposed jury instructions.

{¶25} Accordingly, appellants' second assignments of error are overruled.

### **ASSIGNMENT OF ERROR NO. III**

**The court erred in prohibiting counsel from inquiring into the circumstances surrounding the appellant's son working for the Sheriff and the local drug unit and the fact that no charges were to be filed against the appellant.**

{¶26} Appellants argue that the trial court abused its discretion in refusing to admit evidence that Copsey had entered into an agreement with the prosecution whereby he would serve as a confidential informant in exchange for the charges being dismissed against him and his parents. Appellee, conversely, maintains that while the prosecution did agree with Copsey not to bring charges against him,

there was no parallel agreement regarding the charges against appellants. The appellants contend that evidence of the agreement should have been admitted as it was not part of a plea bargaining session and was relevant to their alleged wrongful conduct.

{¶27} The decision of whether or not to admit evidence rests in the sound discretion of the trial court. *Wightman v. Consol. Rail Corp.* (1999), 86 Ohio St.3d 431, 437, citing *Peters v. Ohio State Lottery Comm.* (1992), 63 Ohio St.3d 296, 299. The Rules of Evidence state that “[a]ll relevant evidence is admissible, except as otherwise provided \* \* \* by these rules[.]” Evid.R. 402. The term “relevant evidence” is also defined by the Rules of Evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Evid.R. 401.

{¶28} The trial court found that the evidence regarding the agreement between Copsey and the prosecutor was not relevant to or probative of “any of the facts necessary to prove these charges.” Marshall and Cheryl were each charged with Assault on a Peace Officer, Obstructing Official Business and Obstructing Justice.

{¶29} The elements of the crime of Assault on a Peace Officer are found in

R.C. 2903.13, which provides:

**(A) No person shall knowingly cause or attempt to cause physical harm to another \* \* \* (C) Whoever violates this section is guilty of assault. \* \* \* (3) If the victim of the offense is a peace officer, a firefighter, or a person performing emergency medical service, while in the performance of their official duties, assault is a felony of the fourth degree.”**

The crime of obstructing official business is found in R.C. 2921.31(A), which states:

**No person, without privilege to do so and with the purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within his official capacity, shall do any act which hampers or impedes a public official in the performance of his lawful duties.**

The crime of obstructing justice is defined by R.C. 2921.32, which provides:

**(A) No person, with purpose to hinder the discovery, apprehension, prosecution, conviction, or punishment of another for crime or to assist another to benefit from the commission of a crime \* \* \* shall do any of the following:  
\* \* \***

**Prevent or obstruct any person, by means of force, intimidation, or deception, from performing any act to aid in the discovery, apprehension, or prosecution of the other person \* \* \*.**

{¶30} After reviewing the charges against appellants, we cannot find that the trial court abused its discretion in refusing to admit evidence of Copsey’s

agreement with the prosecution into evidence for the reason that it was not relevant. The agreement has no tendency to prove or disprove any of the elements of the offenses with which appellants' were charged. It is impossible for us to conclude that an agreement Copsey made with the police *after his arrest* had any relevance to appellants' conduct which gave rise to the charges against them. Moreover, if there was a valid agreement not to prosecute the appellants, testimony in a jury trial was not the proper forum in which to raise the issue.

{¶31} Appellants' third assignments of error are, therefore, overruled.

{¶32} Having found no error prejudicial to appellants herein, in the particulars assigned and argued, we affirm the judgments of the trial court.

Judgments affirmed.

SHAW, P.J., and BRYANT, J., concur.