

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
JACKSON COUNTY

STATE OF OHIO,	:	Case No. 13CA11
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	<u>DECISION AND</u>
	:	<u>JUDGMENT ENTRY</u>
	:	
NICHOLAS A. BETHEL,	:	
	:	
Defendant-Appellant.	:	RELEASED: 8/26/2014

APPEARANCES:

Timothy Young, State Public Defender, and Peter Galyardt, Assistant State Public Defender, Columbus, Ohio, for appellant.

Justin Lovett, Jackson County Prosecuting Attorney, and Pat Story, Jackson County Assistant Prosecuting Attorney, Jackson, Ohio, for appellee.

Harsha, J.

{¶1} Nicholas Bethel appeals his conviction for felonious assault and argues that the trial court committed plain error by omitting the essential element of “by use of a deadly weapon” in its instructions to the jury. That oversight resulted in a manifest miscarriage of justice because with the omission of that disputed element the jury could only properly find Bethel guilty of assault. Therefore, we reverse and remand the matter so that the trial court can modify his conviction and resentence him accordingly.

I. FACTS

{¶2} After Bethel and his girlfriend, Sarah Abbott, got into an argument, she left their shared home, leaving her three children in Bethel’s care. When she returned home with her father, Donald Boyer, she found her son sitting in the corner and her dresser damaged. When her son complained that his buttocks hurt, Abbott lifted up his

shirt and discovered that his lower back and buttocks were covered in red marks and bruises.

{¶3} Abbott and her father immediately went to the police station and reported the incident. Believing that the police were going to arrest Bethel, they returned home with the children. However, when they arrived home they discovered Bethel was still there. Boyer told Bethel to leave but he refused and an altercation ensued. Abbott and Boyer claimed that Bethel attacked Boyer and hit him in the head with a jack handle. However, Bethel maintained that it was Boyer who attacked him with the weapon.

{¶4} The Jackson County Grand Jury returned an indictment charging Bethel with child endangering against the youth and felonious assault against Boyer. Following a trial, the jury convicted him of both offenses. The court imposed a sentence of three years incarceration for his child endangering conviction and six years incarceration for his felonious assault conviction and ordered them to run consecutively. This appeal followed.

II. ASSIGNMENTS OF ERROR

{¶5} Bethel raises three assignments of error for our review:

1. THE TRIAL COURT COMMITTED PLAIN ERROR AND VIOLATED NICHOLAS BETHEL'S RIGHT TO DUE PROCESS WHEN IT FOUND HIM GUILTY OF AND SENTENCED HIM FOR FELONIOUS ASSAULT WHEN ITS JURY INSTRUCTIONS ONLY INCLUDED THE ELEMENTS FOR ASSAULT.
2. NICHOLAS BETHEL WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.
3. A TRIAL COURT COMMITS REVERSIBLE ERROR WHEN IT IMPOSES CONSECUTIVE PRISON TERMS WITHOUT SATISFYING THE STATUTORY MANDATES THAT AUTHORIZE CONSECUTIVE SENTENCES.

III. LAW AND ANALYSIS

A. It Was Plain Error for the Trial Court to Omit an Essential Element In Its Instructions to the Jury

{¶6} In his first assignment of error Bethel argues the trial court committed plain error by finding him guilty of felonious assault when its instructions to the jury only included the elements of assault. Specifically he claims that the trial omitted the element “by use of a deadly weapon,” and because this element distinguishes assault from felonious assault, the jury could only convict him of assault.

{¶7} When a defendant fails to object to erroneous jury instructions, our review is limited to whether the instructions amounted to plain error. *State v. Steele*, 138 Ohio St.3d 1, 2013-Ohio-2470, 3 N.E.3d 135, ¶ 29; *State v. Mockbee*, 2013-Ohio-5504, 5 N.E.3d 50, ¶ 24 (4th Dist.); Crim.R. 52(B). Appellate courts take notice of plain error “with the utmost caution, under exceptional circumstances and only to prevent a miscarriage of justice.” *State v. Mammone*, __Ohio St.3d__, 2014-Ohio-1942, __N.E.3d__, ¶ 69, quoting *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus; *Mockbee* at ¶ 24. To prevail on a claim of plain error, a defendant must show: 1.) there was an error, i.e. a deviation from a legal rule; 2.) the error was plain, i.e. there was an obvious defect in the trial’s proceedings; and 3.) the error affected his substantial rights, i.e. the trial court’s error affected the outcome of the trial. *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002). See also *Steele* at ¶ 30. And “even when the minimum requirements have been met, a reviewing court should still be conservative in its application of plain-error review, reserving notice of plain error for situations involving more than merely theoretical prejudice to substantial rights.” *Steele* at ¶ 30.

{¶8} “As a general rule, a defendant is entitled to have the jury instructed on all elements that must be proved to establish the crime with which he is charged * * *.” *State v. Wamsley*, 117 Ohio St.3d 388, 2008-Ohio-1195, 884 N.E.2d 45, ¶ 17, quoting *State v. Adams*, 62 Ohio St.2d 151, 153, 404 N.E.2d 144 (1980). However, the “[f]ailure of a trial court 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 under Crim.R. 52(B).” *Adams* at paragraph two of the syllabus. Rather, when the trial court fails to instruct the jury on each element of the charged offense, “an appellate court must review the instructions as a whole and the entire record to determine whether a manifest miscarriage of justice has occurred as a result of the error in the instructions.” *Wamsley* at ¶ 17, citing *Adams* at paragraph three of the syllabus.

{¶9} Bethel was charged with felonious assault in violation of R.C. 2903.11(A)(2), a second-degree felony. Here, the state concedes that the trial court erroneously instructed the jury on the elements of felonious assault and we agree. The trial court instructed the jury:

I’m now going to read you the instruction on “*Felonious Assault*.” The defendant is charged with felonious assault. Before you can find the defendant guilty, you must find beyond a reasonable doubt that on or about the 21st day of March 2013 in Jackson County, Ohio the defendant knowingly caused, or attempted to cause physical harm to Donald Boyer.

{¶10} However, R.C. 2903.11(A)(2) provides that: “No person shall knowingly * * * [c]ause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance.” Thus, the court’s instructions were incorrect because they omitted the element “by means of a deadly weapon or dangerous ordnance.” By comparison, R.C. 2903.13 addresses the offense of assault and provides: “(A) No

person shall knowingly cause or attempt to cause physical harm to another * * *.” By omitting the element “by means of a deadly weapon or dangerous ordnance,” the trial court only instructed the jury on the offense of assault. Moreover, the court’s written instructions provided to the jury also reflect this error. And although the court defined “deadly weapon” for the jury, it failed to associate the definition with the felonious assault charge. Thus, there is an obvious defect in the court’s instructions and Bethel has satisfied the first two requirements of the plain error doctrine. Nevertheless, Bethel must still demonstrate that a manifest miscarriage of justice has occurred as a result of the trial court’s error to prevail on his claim of plain error. *Wamsley* at ¶ 17.

{¶11} The state argues that the trial court’s error was harmless because the state presented overwhelming evidence of the omitted element at trial and no other rational conclusion was possible. However, the Supreme Court of Ohio has explained that Crim.R. 52(B) “distinguishes between errors to which a defendant objected at trial and errors that a defendant failed to raise at trial.” *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, ¶ 14. “If the defendant failed to raise an error affecting substantial rights at trial, an appellate court reviews the error under the plain-error standard in Crim.R. 52(B). Under that rule, the *defendant* bears the burden of demonstrating that a plain error affected his substantial rights.” (Emphasis sic.) *Id.* “Alternatively, if the defendant has objected to an error in the trial court, an appellate court reviews the error under the ‘harmless error’ standard in Crim.R. 52(A)-‘a standard significantly more favorable to the defendant.’ * * * Under that rule, the *government* bears the burden of demonstrating that the error did not affect the substantial rights of the defendant.” (Emphasis sic.) *Id.* at ¶ 15, quoting *United States v. Curbelo*, 343 F.3d

273, 286 (4th Cir.2003). Here, the burden under plain error is on Bethel to show the irregularity affected the outcome. Therefore, we construe the state's harmless error argument as an effort to show the omission of the crucial element did not affect a substantial right, i.e. it was not outcome determinative.

{¶12} We have previously found plain error where the jury did not receive an instruction on an essential element of the offense. *State v. Chamblin*, 4th Dist. Adams No. 02CA753, 2004-Ohio-2252, ¶ 14. In *Chamblin*, the defendant was charged with possession of marijuana, a third-degree felony. *Id.* at ¶ 12. Although generally possession of marijuana is a minor misdemeanor, the offense becomes a third-degree felony when the amount possessed exceeds one thousand grams. R.C. 2925.11(C)(3). We determined “[a] jury cannot return a verdict on an offense for which it did not receive an instruction.” *Chamblin* at ¶ 13. And because the trial court failed to instruct the jury that they had to find the defendant possessed a certain amount of marijuana in order to convict him of a third-degree felony, we reversed his conviction. *Id.* at ¶ 14, 17.

{¶13} After reviewing the record in this case, it is clear that the trial court's omission of an essential element in its instructions to the jury created a manifest miscarriage of justice and constituted plain error. The state presented evidence that Bethel attacked Boyer with a jack handle and hit him on the head causing a laceration. However, Bethel testified that he never had the jack handle and denied hitting Boyer with any weapon. Rather, Bethel claimed Boyer and Abbott's uncle attacked him and it was Boyer who had the jack handle. Thus, whether Bethel used a deadly weapon was very much in dispute between the parties. And the court's failure to submit that essential element to the jury caused a manifest injustice because it deprived Bethel of

his right to have the jury decide that issue beyond a reasonable doubt. *State v. Tolliver*, 2013-Ohio-115, 986 N.E.2d 34, ¶ 33 (2nd Dist.). See also *State v. Grigg*, 9th Dist. Summit Nos. 25175, 25176, 25177, 2011-Ohio-1511, ¶ 16 (finding plain error where court omitted essential element of offense in jury instructions because evidence did not overwhelmingly support a conviction); *State v. Keeling*, 1st Dist. Hamilton No. C-010610, 2002-Ohio-3299, ¶ 28 (finding no plain error where trial court omitted essential element of offense in its instructions because the defendant did not dispute the victim's version of events and there was no possible scenario where the jury could have rationally found defendant was not the assailant); *State v. Singh*, 12th Dist. Butler No. CA2000-05-097, 2001 WL 322714, *3 (Apr. 2, 2001) (finding plain error where court omitted mens rea element of offense in its instructions because jury could have reasonably concluded based on evidence that defendant did not act knowingly); *State v. Tolliver*, 2nd Dist. Montgomery No. 15184, 1996 WL 715438, *4 (finding no manifest injustice where court omitted essential element of offense in its instructions because the jury's attention was focused on a different issue).

{¶14} The state also points out that the indictment charged Bethel with felonious assault and specifically alleged he knowingly caused or attempted to cause physical harm to Boyer by use of a deadly weapon in violation of R.C. 2903.11(A)(2). And the state contends the arguments of both the prosecutor and defense counsel centered on the offense of felonious assault. However, the court instructed the jury that “[i]t is your sworn duty to accept these instructions and to apply the law as it is given to you. You are not permitted to change the law, nor to apply your own conception of what you think the law ought to be.” The court also explained to the jury that “[t]he evidence does not

include the indictment, opening statements, or closing arguments of counsel.”

Accordingly, neither of these facts cures the trial court’s error or prevented a manifest miscarriage of justice in this case.

{¶15} The state further claims the trial court’s error was harmless because Bethel did not seek an instruction on the lesser included offense of assault and the verdict form returned by the jury was for felonious assault. Nevertheless, as Bethel points out, the instruction provided to the jury only presented the offense of assault and thus, the fact that he did not seek an instruction on a lesser included offense is without consequence.

{¶16} Because the trial court omitted an essential element and only instructed the jury on the offense of assault, we sustain Bethel’s first assignment of error and reverse his conviction for felonious assault.

B. Bethel’s Remaining Assignments of Error are Moot

{¶17} In his second assignment of error, Bethel contends that his trial counsel was ineffective for failing to move the trial court for an assault conviction due to the court’s erroneous jury instructions. Nevertheless, our resolution of his first assignment of error renders this argument moot and we decline to address it. See App.R. 12(A)(1)(c).

{¶18} Finally, Bethel argues that the trial court erred by imposing consecutive sentences without making the necessary findings as required by R.C. 2929.14(C)(4). However, we have already determined under his first assignment of error that the jury was only authorized to find him guilty of assault, a first-degree misdemeanor. And because a misdemeanor sentence shall be served concurrently with a felony sentence,

subject to certain exceptions not relevant here, his argument is moot and we will not address it. See R.C. 2929.41(A).

IV. CONCLUSION

{¶19} Because the trial court's instructions to the jury omitted a disputed essential element of felonious assault, the error created a manifest miscarriage of justice and constituted plain error. We sustain Bethel's first assignment of error and remand the matter to the trial court to enter a judgment of conviction for assault and sentence Bethel accordingly. This determination renders Bethel's remaining assignments of error moot and we decline to address them.

JUDGMENT REVERSED
AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS REVERSED and that the CAUSE IS REMANDED. Appellee shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Jackson County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hoover, J.: Concur in Judgment and Opinion.

McFarland, J.: Concur in Judgment Only.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

