[Cite as *State v. Diles,* 2004-Ohio-6368.]

COURT OF APPEALS
MORROW COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	William B. Hoffman, P.J.
Plaintiff-Appellee	:	Sheila G. Farmer, J.
	:	Julie A. Edwards, J.
-vs-	:	
	:	Case No. 03 CA 0011
ROBERT R. DILES, JR.	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal From Morrow County Court of Common Pleas Case No. 4567
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 24, 2004

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
CHARLES HOWLAND Morrow County Prosecutor 60 East High Street Mount Gilead, OH 43338	EARL K. DESMOND 75 South Main Street Mount Gilead, OH 43338

Edwards, J.

{¶1} Defendant-appellant Robert R. Diles, Jr. [hereinafter appellant] appeals from his conviction and sentence in the Morrow County Court of Common Pleas on one count of failure to comply with the order/signal of a police officer and one count of felonious assault. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On May 20, 2002, appellant was indicted on one count of failure to comply with the order/signal of a police officer, in violation of R. C. 2921.331(B), and one count of felonious assault, in violation of R. C. 2903.11. The count of felonious assault was enhanced to a felony of the first degree because the alleged victim was a peace officer, specifically Deputy Otterbacher of the Morrow County Sheriff's Office.

{¶3} A jury trial was held on January 27, 28, and 29, 2003. During opening statements, appellant's counsel admitted that appellant was guilty of fleeing from peace officers but denied that appellant ever tried to harm the Deputy. The following evidence was produced at trial.

{¶4} Deputy Otterbacher testified as follows. The Deputy claimed that on April 25, 2002, he initiated a traffic stop on appellant's vehicle for a traffic violation. Initially, appellant stopped the vehicle but then took off after Deputy Otterbacher exited his cruiser. A chase ensued. Other officers joined the chase. Eventually, Deputy Otterbacher passed appellant's vehicle. Deputy Otterbacher then slowed his cruiser in an attempt to stop appellant's vehicle. The Deputy claimed that once he was in front of appellant's vehicle, appellant swerved first left and then right, entering a ditch on the right side of the road, proceeded down the ditch and exited the ditch behind the

Deputy's cruiser. Deputy Otterbacher claimed that appellant had the vehicle under control and drove his vehicle beside the Deputy's cruiser, looked straight at the Deputy and then turned his vehicle straight into the Deputy's cruiser.

{¶5} The Deputy testified that when the two vehicles came into contact, the Deputy felt that appellant was trying to push him off the road. According to the Deputy, when appellant's vehicle broke away from the Deputy's vehicle, appellant picked up speed, turned toward the Deputy and caused the rear of appellant's vehicle to hit the Deputy's cruiser. This caused the appellant's vehicle to spin out and come to a stop.

{¶6} Appellant ran from his vehicle and a foot chase ensued. Appellant was apprehended when he surrendered by laying down in a yard. The Deputy admitted that he was not hurt by any actions of appellant.

{¶7} Four other peace officers testified to essentially the same facts as Deputy Otterbacher. However, Ohio State Patrol Trooper Shad Bierdeman also testified for the State. Trooper Bierdeman stated that he investigated the scene of the chase and crash. Trooper Bierdeman was permitted to give his opinion as a crash investigator concerning the actions of appellant at the critical time period when Deputy Otterbacher claimed that appellant intentionally attempted to assault the Deputy with his vehicle. The Trooper opined that there was no indication that appellant's vehicle came under control as appellant's vehicle exited the ditch. According to the Trooper, the vehicles were traveling at 80 feet per second and that he did not know how one could regain control under those circumstances. In his expert opinion, the Trooper did not believe that appellant had control of the vehicle when he came back onto the roadway. The Trooper concluded that no matter what speed the vehicles were traveling, there would

have been only a matter of a second or two between when appellant's vehicle came out of the ditch and there was contact with the Deputy's cruiser.

{¶8} The State rested. The defense called appellant as a witness. Appellant testified that he was 19 years old and had owned the vehicle only a short period of time. Appellant claimed that the vehicle did not run well, that the vehicle took two hands to steer and that he only had a driver's permit. Appellant admitted that he knew it was wrong to drive that day and stated that when he was stopped by Deputy Otterbacher he panicked. Appellant testified that when Deputy Otterbacher passed him and applied his brakes, appellant was forced to pull his car to the right and come up along side of the Deputy. At that point, appellant claimed that the Deputy's vehicle made contact with his vehicle and "tipped" him, forcing him to slide sideways into the ditch.

{¶9} Appellant then claimed that he slid in the ditch approximately 200 feet and when he came out of the ditch he managed to straighten the vehicle out just as the Deputy pushed his vehicle from the rear. According to appellant, this caused his vehicle to spin out and forced his vehicle to a stop. When specifically asked if he was mad or angry at the officers or had intentionally, knowingly or purposely turned his vehicle into the Deputy's cruiser, appellant answered "no". When specifically asked if he ever made intentional contact with the Deputy's vehicle, he answered "no". When asked if he had gained control of his vehicle after entering the ditch, appellant once again answered "no". Tr. at 403-404.

{¶10} After cross examination by the State, the defense rested. Then, out of the presence of the jury, defense counsel requested 1) an instruction on accident, 2) a statement on attempt based upon the case of *State v. Brooks* (1989), 44 Ohio St.3d

185, 542 N.E.2d 636 [1]and 3) an instruction on negligent assault which counsel argued was a lesser included offense of felonious assault. After discussion of the issues, the trial court concluded that an instruction should be given on accident. The trial court further ruled that the lesser included offense of negligent assault was not a lesser included offense of felonious assault so no instruction would be given on negligent assault. The trial court did not give an instruction on attempt based upon *State v. Brooks*, supra., but did define attempt as "when a person knowingly engages in conduct that, if successful, would result in physical harm." Tr. at 500.

{¶11} The trial court then charged the jury. Subsequently, the jury found appellant guilty on both counts. Appellant was sentenced by the trial court to a prison term of three years for the failure to comply conviction and a prison term of five years for the felonious assault conviction. The trial court ordered that the sentences be served concurrently to each other.

{¶12} It is from this conviction and sentence that appellant appeals, raising the following assignments of error:

{¶13} "I. THE TRIAL COURT ERRED AS A MATTER OF LAW BY OVERRULING DEFENDANT'S MOTION FOR AN INSTRUCTION ON THE LESSER INCLUDED CHARGE OF NEGLIGENT ASSAULT.

{¶14} "II. THE TRIAL COURT ERRED WHEN IT FAILED TO GIVE A REQUESTED CHARGE WHICH WAS PERTINENT TO THE CASE, STATES THE LAW CORRECTLY AND IS NOT COVERED BY THE GENERAL CHARGE."

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[1] In *State v. Brooks*, supra., the Ohio Supreme Court held that in order to prove an attempt to cause physical harm, the State was required to show that the defendant took a direct, ineffectual step in a course of conduct calculated to cause physical harm.

I

{¶15} In the first assignment of error, appellant contends that the trial court erred when it failed to instruct the jury on the offense of negligent assault. Appellant contends that negligent assault is a lesser included offense of felonious assault. We disagree.

{¶16} In *State v. Deem* (1988), 40 Ohio St.3d 205, 533 N.E.2d 294, paragraph three of the syllabus, the Supreme Court of Ohio set forth the following three-part test to determine whether an offense is a lesser included offense of another offense:

{¶17} "An offense may be a lesser included offense of another if (i) the offense carries a lesser penalty than the other; (ii) the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and (iii) some element of the greater offense is not required to prove the commission of the lesser offense. (*State v. Kidder* [1987], 32 Ohio St.3d 279, 513 N.E.2d 311, modified.)"

{¶18} To commit the offense of felonious assault as charged herein, the offender must "…knowingly …: [c]ause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance." R.C. 2903.11(A)(2).

{¶19} On the other hand, to commit the offense of negligent assault, the offender must "negligently, by means of a deadly weapon or dangerous ordnance… cause physical harm to another or to another's unborn." R.C. 2903.14.

{¶20} Applying the *Deem* test, we find that negligent assault is not a lesser included offense of felonious assault. The greater offense, felonious assault, as

statutorily defined, can be committed without the lesser offense, negligent assault, as statutorily defined, being committed. Contra e.g., *State v. Wong* (1994), 95 Ohio App.3d, 39, 641 N.E.2d 1137; *State v. Egolf* (Feb. 7, 2003), Lake App. No. 2000-L-113, 2003 WL 292108. One can commit felonious assault by attempting to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordinance. R.C. 2923.11(A)(2). Thus, there need be no showing of actual harm. However, negligent assault requires a showing that physical harm was caused.

{¶21} Accordingly, we find that felonious assault, as statutorily defined, can be committed without committing the offense of negligent assault. Thus, negligent assault is not a lesser included offense of felonious assault. As such, the trial court did not err when it failed to instruct the jury on the offense of negligent assault.

{¶22} Appellant's first assignment of error is overruled.

II

{¶23} In the second assignment of error, appellant argues that the trial court should have given a requested instruction on attempt. Appellant sought an instruction based upon *State v. Brooks* (1998), 44 Ohio St.3d 185, 542 N.E.2d 636. In *State v. Brooks*, supra., the Ohio Supreme Court held that in order to prove an attempt to cause physical harm, the State was required to show that the defendant took a direct, ineffectual step in a course of conduct calculated to cause physical harm.

{¶24} It is not entirely clear whether trial counsel requested such an instruction in regard to negligent assault, felonious assault, or both. However, we find that, in any case, appellant's argument on appeal fails.

{¶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, 541 N.E.2d 443. 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, 450 N.E.2d 1140.

{¶26} If appellant's argument pertains to the negligent assault charge, we find it has no merit. Since this Court has found that it was not error to fail to give an instruction on negligent assault, it is not error to fail to give an instruction on attempt in regard to negligent assault.

{¶27} If the instruction pertained to the felonious assault charge, we find no error. The trial court instructed the jury that an attempt occurs "when a person knowingly engages in conduct that, if successful, would result in physical harm." This instruction on attempt is in accordance with the applicable definition of attempt found in R.C. 2923.02(A) and is sufficient. *State v. West,* Cuyahoga App. No. 82579, 2003-Ohio-7067.

{¶28} Accordingly, we find no abuse of discretion.

{¶29} Appellant's second assignment of error is overruled.

{¶30} The judgment of the Morrow County Court of Common Pleas is affirmed.

By: Edwards, J.

Hoffman, P.J. and

Farmer, J. concur

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JUDGES

JAE/0902

[Cite as *State v. Diles,* 2004-Ohio-6368.]

IN THE COURT OF APPEALS FOR MORROW COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
ROBERT R. DILES, JR.	:	
Defendant-Appellant	:	CASE NO. 03 CA 0011

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Morrow County Court of Common Pleas is affirmed. Costs assessed to appellant.

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JUDGES