[Cite as *State v. Farringer*, 2015-Ohio-2644.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
SCOTT L. FARRINGER	:	Case No. 14-CA-43
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 2013-CR-0493
JUDGMENT:	Affirmed/Reversed in Part and Remanded
DATE OF JUDGMENT:	June 29, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
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Farmer, P.J.

{¶1} On October 18, 2013, the Fairfield County Grand Jury indicted appellant, Scott Farringer, on three counts of murder in violation of R.C. 2903.02, one count of voluntary manslaughter in violation of R.C. 2903.03, one count of involuntary manslaughter in violation of R.C. 2903.04, two counts of kidnapping in violation of R.C. 2905.01, one count of felonious assault in violation of R.C. 2903.11, and one count of abduction in violation of R.C. 2905.02. Said charges arose from the death of Denise Haught after a day and night of drinking and arguing. She died as a result of asphyxiation caused by strangulation. She and appellant had a child together.

{¶2} A jury trial commenced on May 20, 2014. The jury found appellant guilty of the lesser included offense of reckless homicide in violation of R.C. 2903.04 on one of the murder counts, the involuntary manslaughter count, and the abduction count. The jury found appellant not guilty of the remaining counts. By judgment entry filed June 23, 2014, the trial court merged the reckless homicide and involuntary manslaughter convictions and sentenced appellant to eleven years in prison. The trial court also sentenced appellant to thirty-six months on the abduction conviction, to be served consecutively to the eleven year sentence.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN INSTRUCTING THE JURY THAT HE HAD A DUTY TO RETREAT FROM HIS OWN TEMPORARY RESIDENCE TO PROVE SELF-DEFENSE."

II

{¶5} "THE DEFENDANT-APPELLANT WAS SENTENCED TO CONSECUTIVE TERMS CONTRARY TO OHIO LAW AND THE STATE AND FEDERAL CONSTITUTIONS."

I

{¶6} Appellant claims the trial court erred in giving the "duty to retreat" charge in the self-defense jury instructions as he was temporarily residing in the victim's home by her invitation and therefore had no duty to retreat. We disagree.

{¶7} The complained of charge reads as follows (T. at 1781-1782):

> To establish self-defense, the Defendant must prove by the greater weight of the evidence that (A), he was not at fault in creating the situation giving rise to the death of Denise Haught; and (B), he had reasonable grounds to believe and an honest belief, even if mistaken, that he was in imminent danger of death or serious physical harm, and that his only reasonable means of retreat or escape from such danger was by the use of deadly force; and (C), he had not violated any duty of retreat or escape to avoid the danger.
>
> Concerning the term "duty to retreat."
>
> The Defendant had a duty to retreat if (A), he was at fault in creating the situation giving rise to the death of Denise Haught; or (B), he did not have reasonable grounds to believe and an honest belief that he was in imminent danger of death or serious physical harm, or that he had

a reasonable means of escape from that danger, other than by the use of deadly force.

{¶8} Crim.R. 30 governs instructions. Subsection (A) states in pertinent part: "On appeal, a party may not assign as error the giving or the failure to give any instructions unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection."

{¶9} The prosecutor, defense counsel, and the trial court discussed the self-defense jury charge as it related to the numerous counts. T. at 1677-1679. The trial court made changes to the jury instructions and gave counsel the opportunity to review the final instructions. T. at 1679. There is nothing in the record to indicate any objection to the final version, either before or after the reading to the jury. T. at 1769, 1836, 1838. No request was made for an additional charge, "no duty to retreat," per the cases argued in appellant's appellate brief, *State v. Jackson,* 22 Ohio St.3d 281 (1986), and *State v. Williford,* 49 Ohio St.3d 247 (1990).

{¶10} Because an objection was not made, we will review the arguments herein under a plain error standard. In order to prevail under a plain error analysis, appellant bears the burden of demonstrating that the outcome of the trial clearly would have been different but for the error. *State v. Long,* 53 Ohio St.2d 91 (1978); Crim.R. 52(B). Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Long* at paragraph three of the syllabus.

{¶11} Appellant argues the outcome would have been different if a "no duty to retreat" instruction had been given. Appellant argues he did not have a duty to retreat as he was temporarily residing in the victim's home by her invitation. We disagree. Although appellant did not testify, he gave numerous statements to the police. State's Exhibits 40, 62, 114, and 124. While he consistently stated that the victim hit him first, he never indicated he believed he was in imminent danger of death or serious physical harm or had no other means of escape to avoid danger other than the use of deadly force as he could not recall using deadly force i.e., strangulation.

{¶12} A friend of the victim's, Robert McDowell, was living in her home, sleeping on the couch. T. at 100, 104-105. He testified that although appellant and the victim had a child together, appellant did not live at the home. T. at 108-109. On the date of the incident, appellant and the victim engaged in a day of drinking. T. at 121-123, 770-771; State's Exhibit 40. The couple then left to go to a bar where they continued drinking and engaged in a verbal and physical altercation. T. at 125, 577-585, 772-773. They returned to the victim's home and continued arguing in her bedroom. T. at 129, 773. Before the night was over, the victim died as a result of asphyxiation caused by strangulation. T. at 428.

{¶13} Upon waking up in the morning, unaware that the victim was dead, appellant called his employer, Walter Hudson, to call off work. T. at 361-362, 509, 1056-1057, 1061; State's Exhibits 62 and 124. Appellant told Mr. Hudson he had "been jumped" and he did not know where he was. T. at 510, 1056. Mr. Hudson believed appellant was hung over. T. at 511-512. After speaking with the police, appellant called Mr. Hudson later that evening and admitted the earlier story was not true. T. at 359,

517, 523. Appellant told Mr. Hudson the victim "had beat on him." *Id.* Appellant told him he and the victim had been drinking all day, they "got into it" while at a bar later in the evening, they returned to the victim's home, and when he attempted to sleep, the victim "came in and started wailing on him." T. at 517-520. Appellant had stated " '***I just kept her off me, and then I went to sleep.' " T. at 520. Appellant told Mr. Hudson the victim had attacked him. T. at 568.

{¶14} During an initial interview with the police, appellant was unable to recall most of the evening's events. T. at 781, 784, 807-808; State's Exhibit 40. He could not remember engaging in a physical struggle with the victim in her bedroom, although he admitted he could have. T. at 783.

{¶15} During a follow-up interview with the police, appellant stated he was awakened by the victim yelling at him and hitting him. T. at 1054, 1075-1076, 1095; State's Exhibit 62. After that, appellant explained any physical interactions with the victim were defensive actions to protect himself from the victim's aggression. T. at 1054, 1077-1084, 1548-1551. Appellant did not punch the victim and was not trying to hurt the victim in anyway, but he pushed against her to keep her away. T. at 1081-1084, 1095, 1098, 1151, 1549. They ended up on the floor because appellant was "trying to protect myself from her hitting me." T. at 1097. He had his arm out across her chest area trying to block her arms. T. at 1103-1106. Since the victim stopped fighting, appellant assumed she had passed out. T. at 1111.

{¶16} Following his arrest, appellant was interviewed again. T. at 1304; State's Exhibit 114. He reiterated that he was defending himself from the victim and they ended up on the floor. T. at 1335-1338, 1425, 1437. Appellant stated that if his arm

was on her neck, he did not mean for it to be there. T. at 1346. If he was choking her, he did not know he was. T. at 1428-1429, 1552. " 'You know I thought I was just keeping her back at the chest, you know. I didn't know. You know, I didn't know if I was up too high, if I did that.' " T. at 1552. He did not recall her going limp or gasping for breath. T. at 1436. During this interview, appellant described passive resistance to an ongoing attack (T. at 1445-1446):

> MR. FARRINGER: - - - that was kind of a blur to me. Okay? I remember just trying to keep her off. I remember that finally, I was able to get away from her, you know, and she wasn't coming back after me again. And that's all I was worried about was keeping - - for all I know, she could have got back up and came after me again at that point, you know, but - -
>
> DETECTIVE MEADOWS: But she didn't get back up and come after you.
>
> MR. FARRINGER: But she didn't get back up and come back after me, so I thought great, the situation's over with. Let's get some rest.
>
> DETECTIVE MEADOWS: And why didn't she get back up and come after you?
>
> MR. FARRINGER: Obviously, because she was passed out dead, you know, obviously, you know. But I - - -
>
> DETECTIVE ROBBERTS: That's what we're trying to get - - that's what he's trying to tell you now, because we see that.
>
> DETECTIVE MEADOWS: How did she get passed out dead?

DETECTIVE ROBBERTS: She attacked you once. You're going to check her to see what's going to happen.

MR. FARRINGER: I did not check her. I did not check her. I didn't feel like I had to check her for anything. I didn't. I thought that maybe she - - -

DETECTIVE ROBBERTS: Why would you not check her? She done attacked you once. That's why you would check her, to make sure she's not going to attack you again.

MR. FARRINGER: No. My only concern was her coming after me. That was all I was worried about.

{¶17} Appellant consistently told the police he was protecting his face and blocking with his arms (T. at 1546-1547):

Q. He was also clear that he was defending himself.

A. That's what he was saying, yes.

Q. He told you he never punched back. He was just defending himself.

A. Correct.

Q. And he said he was defending himself - - "It was purely out of me trying to defend myself. I was on the defensive the whole time."

A. Correct.

Q. He told you that at Bannon Court in the middle of the interview.

A. That's correct.

Q. 25, 30 minutes in.

A. Correct.

Q. He tells you he was protecting his face.

A. That's correct.

Q. Blocking her arms.

A. Correct.

Q. Protecting his face and blocking her arms.

A. Correct.

Q. At the Detective Bureau, he says, "I think she's trying to hurt me. That's what I was thinking, you know. Everything that she did to me, I feel like all the scratches, the bruises, the bumps, I've got a feel that she was trying to hurt me. I think I was just trying to defend myself 100 percent the whole time. I feel like everything that happened to me was her trying to attack me."

A. That's correct.

{¶18} When EMS arrived on the scene, appellant was seen by a medic. T. at 313. Appellant had a left black eye, scraps and abrasions on both sides at the base of his neck, small lacerations and bruising on the first and third knuckles of his right hand, several scrapes and bruises on his forehead, and small cuts on his left forearm. T. at 319.

{¶19} The jury charge given was consistent with appellant's defense that he was not at fault in starting the conflict between the two and he was protecting himself from the victim. However, as stated above, appellant never indicated he believed he was in imminent danger of death or serious physical harm or had no other means of escape to avoid danger other than the use of deadly force as he could not recall using deadly force i.e., strangulation. Therefore, the "duty to retreat" instruction was proper. As for a "no duty to retreat" instruction, the victim was in her own home and appellant was her invited guest. He did not reside in the victim's home. Such an instruction would not have conformed to the evidence presented. "[A] court's instructions to the jury should be addressed to the actual issues in the case as posited by the evidence and the pleadings." *State v. Guster,* 66 Ohio St.2d 266, 271 (1981).

{¶20} Upon review, we do not find plain error in the complained of jury instructions.

{¶21} Assignment of Error I is denied.

II

{¶22} Appellant claims the trial court erred in sentencing him to consecutive sentences as the trial court should have merged the offenses of involuntary manslaughter and abduction because the conduct of each offense occurred at the same time and arose out of the same course of conduct. Appellant claims there was no separate animus. We agree.

{¶23} R.C. 2941.25 governs multiple counts and states the following:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶24} During the course of this appeal, the Supreme Court of Ohio once again redefined "separate animus" in *State v. Ruff,* ___ Ohio St.3d ___, 2015 WL 1343062, 2015-Ohio-995, paragraph two of the syllabus and ¶ 30-31, respectively:

> Two or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable.
>
> ***
>
> Rather than compare the elements of two offenses to determine whether they are allied offenses of similar import, the analysis must focus on the defendant's conduct to determine whether one or more convictions

> may result because an offense may be committed in a variety of ways and the offenses committed may have different import. No bright-line rule can govern every situation.
>
> As a practical matter, when determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts must ask three questions when defendant's conduct supports multiple offenses: (1) Were the offenses dissimilar in import or significance? (2) Were they committed separately? and (3) Were they committed with separate animus or motivation? An affirmative answer to any of the above will permit separate convictions. The conduct, the animus, and the import must all be considered.

{¶25} Appellant was convicted of involuntary manslaughter in violation of R.C. 2903.04(A) which states: "No person shall cause the death of another or the unlawful termination of another's pregnancy as a proximate result of the offender's committing or attempting to commit a felony," and abduction in violation of R.C. 2905.02(A)(2) which states: "No person, without privilege to do so, shall knowingly***[b]y force or threat, restrain the liberty of another person under circumstances that create a risk of physical harm to the victim or place the other person in fear."

{¶26} As set forth above, appellant and the victim drank during the day of the incident. T. at 121-123. They then went to a bar and engaged in a verbal and physical altercation. T. at 125, 577-585, 772-773. They returned to the victim's home and continued arguing in her bedroom. T. at 129, 773. Each attacked each other's

parenting skills relative to their child. T. at 133-134. The argument became so loud that it awakened a child sleeping in another bedroom and Mr. McDowell who was sleeping on the couch. T. at 136-137. The couch was in the living room adjacent to a breezeway which had been converted into a bedroom for the victim. T. at 116-118. The bedroom had a curtained doorway. *Id*.

{¶27} Mr. McDowell heard about fifteen minutes of arguing. T. at 136. He heard the victim say " '[s]top, quit, quit, stop' " followed by " '[c]all 911' " and then saying she was tired of appellant "hitting and pushing her around, beating on her." T. at 140-143. While Mr. McDowell looked for a phone to call 911, the verbal exchange continued. T. at 144-145. He was unable to find a phone, so he told them to "calm down, sleep it off, work it out in the morning." T. at 146-147. The argument became lower in volume with appellant continuing to verbally attack the victim. T. at 147-149. Mr. McDowell fell asleep and did not wake up until the next morning. T. at 152-153. The victim was found the next morning dead on her bedroom floor laying face down on her stomach. T. at 154, 260, 774.

{¶28} Deputy Coroner Charles Lee ruled the cause of death was asphyxiation (T. at 428):

> Q. Dr. Lee, were you able to come to a conclusion at what caused this woman's death?
>
> A. Yes.
>
> Q. And what was that conclusion?

A. That she was asphyxiated from a combination of manual strangulation and possibly either cupping or closing off the nose and mouth with a hand, or some other substance, a pillow or something that caused the bruises to the lip and tongue. Or that might be from a blow or punch to the mouth to cause the lip and tongue injuries. But it is a possibility that something was placed over her mouth. As well as the bruising to the head and all those injuries to the head, with the blunt force injury and bleeding, that also has a component in her death.

But if that was the only thing she had, she shouldn't be dead just from the blunt injury. It's not a major thing. It's minor. But it still is more trauma that she is suffering.

{¶29} Deputy Coroner Lee further explained the following (T. at 431-432):

Q. What are methods that asphyxia, like you've seen with Ms. Haught, occur?

A. I feel she was grabbed around the neck, maybe once, maybe twice, maybe - - since she has the marks on her hands, that she was doing some punching and some aggressive - - I feel it's hand-to-hand combat. She's got some pressure on her neck, mostly by hands, maybe a crook of the elbow or something once or twice, but definitely, with hands. Or maybe even the shirt she was wearing could have been grabbed from behind, back of the collar and pulled up on her neck that might make

> some of these marks here. But a combination of that is what caused her asphyxia. Maybe - - again, maybe a mouth or something over her face, maybe part of her shirt squeezed up, put over her nose and mouth.

{¶30} The physical evidence indicated strangulation. There was parallel bruising on each side of the victim's neck, small red dots under her eyes and on her cheek and neck indicating an obstruction in the neck area preventing the flow of blood back out of the head, and some bleeding on the back side of her esophagus, all consistent with a compression or squeezing around the neck such as strangulation. T. at 390-391, 392-393, 419, 437. Hemorrhages found on her neck would be consistent with a "V-like" hand hold of the victim's neck. T. at 443, 445-446. There were "aggressive wounds" on her knuckles and "defensive wounds" on the back of her hand and wrist indicating a "tussle" with another person. T. at 398-399.

{¶31} The victim suffered a subdural hemorrhage which was caused by blunt force trauma to the head, either by something hitting the head or the head hitting something such as a table or windowsill. T. at 469. The hemorrhage occurred after asphyxiation, but before death. T. at 472-473. Most likely, the victim passed out before she received the subdural hemorrhage. T. at 473.

{¶32} The state argues appellant completed the offense of abduction before moving on to the next, involuntary manslaughter, and the offenses occurred separately in time.

{¶33} During the sentencing hearing, the trial court made the following specific findings relative to allied offenses and separate animus (June 17, 2014 T. at 49-50):

> The Court finds that - - and believes that what occurred here is that the Defendant and the victim, Ms. Denise Haught, were in what initially started as a verbal argument, which eventually turned into a physical altercation, a physical altercation, which, at some point, resulted in the Defendant grabbing the victim, Ms. Haught, around and about the neck and restraining her.
>
> The Court finds that the offense of abduction was at that point committed and completed at the point that there was sufficient force to restrain her from - - as is required for proof to commit the offense of abduction.
>
> The Court finds that thereafter, the Defendant committed the offense of involuntary manslaughter by his continued application of force upon the Defendant's *(sic)* region for a significant period of time so as to result in a proximate way in the death of the victim, Ms. Denise Haught.
>
> The Court finds that the Defendant's actions in this regard, and the initial restraint and the restraint thereafter were distinct in time, distinct in purpose, intent and manner, and for those reasons, has made its ruling as I've indicated, to find that separate sentences can be imposed as to each of these two offenses.

{¶34} The facts establish that appellant and the victim returned to the victim's home and bedroom, presumably at the victim's invitation. It is the state's theory that the

victim's cry for help overheard by Mr. McDowell constituted restraint of the victim and consequently the abduction. We find the cries for help coincided with the couple's argument continuing, lessening, and then stopping; the stop point being the passing out of the victim. The victim's cause of death was asphyxiation by strangulation. The state argued, and the trial court agreed, that the strangulation was caused by the "V-like" hand hold compression of the victim's neck. We find this hand hold compression was a "restraint."

{¶35} Using the template set forth in *Ruff, supra,* which the trial court did not have the benefit of knowing at the time of sentencing, we find the offenses are of similar import. We so find because the harm that resulted from the abduction and the harm that resulted from the involuntary manslaughter were not separate and identifiable. The mode of each offense was the restraint/strangulation of the victim.

{¶36} Upon review, we find the trial court erred in sentencing appellant to consecutive sentences.

{¶37} Assignment of Error II is granted.

{¶38} The judgment of the Court of Common Pleas of Fairfield County, Ohio is hereby affirmed in part, reversed in part, and remanded to said court for resentencing consistent with this opinion.

By Farmer, P.J.

Wise, J. and

Delaney, J. concur.

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