[Cite as *State v. Miller*, 2016-Ohio-8239.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
JACK T. MILLER	:	Case No. 16-CAA-010005
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 15 CRI 01 0018
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	December 16, 2016

APPEARANCES:

For Plaintiff-Appellee

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Farmer, P.J.

{¶1} On January 16, 2015, the Delaware County Grand Jury indicted appellant, Jack Miller, on one count of felonious assault in violation of R.C. 2903.11. Said charge arose from an altercation between appellant and his neighbor.

{¶2} A jury trial commenced on November 5, 2015. At the close of the state's case-in-chief, appellant moved for a Crim.R. 29 acquittal. The trial court denied the motion. The jury found appellant guilty as charged. By judgment entry filed December 29, 2015, the trial court sentenced appellant to community control sanctions which included thirty days in jail.

{¶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 IN DENYING THE DEFENDANT'S MOTION FOR ACQUITTAL AFTER THE PRESENTATION OF THE STATE'S CASE BECAUSE THE DEFENDANT WAS CONVICTED ON INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT HE CAUSED THE ALLEGED VICTIM'S INJURY."

II

{¶5} "THE TRIAL COURT COMMITTED PLAIN ERROR BY INTRODUCING MISSTATEMENTS OF THE LAW ON THE MATERIAL ELEMENT OF 'KNOWINGLY' BY THE PROSECUTION DURING CLOSING ARGUMENT AND BY THE COURT ITSELF AS A RESPONSE TO A JURY QUESTION DURING DELIBERATIONS."

I

{¶6} Appellant claims the trial court erred in denying his Crim.R. 29 motion for acquittal. Appellant does not dispute that the victim suffered serious physical harm, but claims the evidence did not establish that he "caused" the injury. Appellant claims his acts of trespassing on the victim's property and engaging in a wrestling match did not cause the injury. We disagree.

{¶7} Crim.R. 29 governs motion for acquittal. Subsection (A) states the following:

> The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case.

{¶8} The standard to be employed by a trial court in determining a Crim.R. 29 motion is set out in *State v. Bridgeman,* 55 Ohio St.2d 261 (1978), syllabus: "Pursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt."

{¶9} Appellant was convicted of felonious assault in violation of R.C. 2903.11(A)(1) which states: "No person shall knowingly do either of the following:***Cause serious physical harm to another or to another's unborn."

{¶10} In his appellate brief at 7, appellant sets forth the definition of "cause" as set forth in the trial court's jury charge:

> 'Cause' is an essential element of the offense. Cause is an act or failure to act which in a natural and continuous sequence directly produces serious physical harm to another and without which that harm would not have occurred.
>
> The Defendant's responsibility is not limited to the immediate or most obvious result of the Defendant's act or failure to act. The Defendant is also responsible for the natural and foreseeable consequences or results that follow, in the ordinary course of events, from the act or failure to act.

{¶11} The testimony of the victim established the confrontation with appellant was the result of a standing dispute about late evening/early morning (1:00 a.m.) noise occurring when appellant returned home e.g., honking horn, slamming of trash can lids and car hood. T. at 66-67, 86, 89. On the night in question, after the victim was awakened by the noise, he went outside to his back porch. T. at 67, 69, 90. Appellant looked at the victim and asked "do you have something that you fucking want to say." T. at 70. The victim returned to his home to retrieve a camera and a flashlight. *Id.* When he went back outside, appellant was going back into his home. T. at 71. Appellant then approached

the victim, removing his hands from his pockets and crossing the property line. T. at 73, 109; State's Exhibit 4. The victim told appellant to leave his property, but appellant kept approaching. *Id.* The victim then testified to the following: "He came at me and assaulted me. I dropped the camera and I believe I hit him with the flashlight and then we got into what I'm going to say is a wrestling match where he had gotten ahold of the front of my shirt with his left hand and gotten ahold of my hair with his right hand and trying to hit my head into the concrete." T. at 74. The entire struggle lasted about ten seconds. *Id.* Appellant then left and returned to his home and the victim called the police. *Id.*

{¶12} The victim suffered right shoulder pain, multiple abrasions, and his glasses were smashed. T. at 75. The victim underwent two surgeries to repair his injured shoulder. T. at 78, 81.

{¶13} Under the Crim.R. 29 standard, we find there was sufficient evidence to support the trial court's denial of the motion i.e., appellant's act of trespassing, continuing to approach the victim when told to stop, taking his hands out of his pockets, and grabbing the victim's shirt and hair.

{¶14} Upon review, we find the trial court did not err in denying the motion for acquittal.

{¶15} Assignment of Error I is denied.

II

{¶16} Appellant claims the trial court erred in permitting the state to misstate the law on "knowingly" and in giving an erroneous jury instruction on "knowingly" in response to a jury question during deliberations. We disagree.

{¶17} Crim.R. 30 governs instructions. Subsection (A) states the following 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. Opportunity shall be given to make the objection out of the hearing of the jury."

{¶18} Appellant concedes an objection on the state's argument of "knowingly" was not made, nor were any objections made to the jury charge. An error not raised in the trial court must be plain error for an appellate court to reverse. *State v. Long,* 53 Ohio St.2d 91 (1978); Crim.R. 52(B). 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. *Long*. Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Id*. at paragraph three of the syllabus.

{¶19} During closing argument, the prosecutor argued the following (T. at 264-265):

> MR. PENKAL: ***And no one's hands are clean, Mr. Miller or Mr. [F.]'s in this case, both of them are grown men, okay, but that's not the issue. The issue is what happened in those 10 seconds or 15 seconds, however long you want to say, in the moments that preceded it. So what did Mr. Miller admit to? He told you that he took his hands out of his pockets because he knew there was going to be a fight. Asked point-blank, took your hands out of your pockets because you knew there was going to be a

fight, yes. What are the natural consequences of a fight? That someone is going to get seriously hurt.

MR. MANGO: Objection, Your Honor, that's completely misleading.

THE COURT: I'll allow it. It's argument, go ahead.

MR. PENKAL: Remember, it's probably be of a certain nature or probably cause a certain result, getting into a fight will cause, and it did cause in this case serious physical harm to Mr. [F.]. This is a guy, the Defendant, Mr. Miller, who wanted a fight. He went up, knew there was going to be a fight, took his hands out of his pocket and look at what he admitted to, he admitted to grabbing Mr. [F.].

{¶20} The trial court properly instructed the jury that opening statements and closing arguments are to assist the jury and do not constitute evidence. T. at 293. The trial court also gave a complete and standard instruction on "knowingly." T. at 296.

{¶21} During deliberations, the jury sent out the following question and the trial court stated the following (T. at 308):

THE COURT: Okay. We're on the Record in our State versus Miller case and the jury has sent out a question. The question reads: There is some clarification needed on the meaning of knowingly cause physical harm. Does it require that he knew his actions would cause serious harm and he intended to do so or he knew his actions could lead probably to serious harm?

What I think I may say is proof of the Defendant's motive or intent or purpose is not part of the elements of felonious assault. Instead, as I've explained to you, the State must prove that the Defendant acted knowingly and that he caused serious physical harm.

And then I thought I would give the definition of knowingly from Chapter 2901 from the revised code, a person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact. Any thoughts?

{¶22} Defense counsel suggested to the trial court to add the definition of "cause." T. at 309. No other suggestion or objection was made relative to the jury question. The trial court then instructed the jury as follows (T. at 312-313):

Your question reads: There is some clarification needed on the meaning of knowingly caused physical harm. Does it require that he knew his actions would cause serious harm and he intended to do so or he knew his actions could lead probably to serious harm?

My answer to you is this: Proof of the Defendant's motive or intent or purpose is not part of the elements of felonious assault. Instead, as I've explained to you, the State must prove that the Defendant acted knowingly and that he caused serious physical harm. A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact.

And then as the instructions indicate, again definition of cause. Cause is an essential element of the offense. Cause is an act or failure to act which in a natural and continuous sequence directly produces serious physical harm to another and without which that harm would not have occurred.

The Defendant's responsibility is not limited to the immediate or most obvious result of his act or failure to act. The Defendant is also responsible for the natural and foreseeable consequences or the results that follow, in the ordinary course of events, from the act or failure to act.

{¶23} Appellant argues the trial court negated the element of "intent." However, in the original jury charge and in writing, the proper instruction was given to the jury. T. at 296.

{¶24} Upon review, we find the jury instructions, when viewed in their entirety, does not rise to the level of plain error.

{¶25} Assignment of Error II is denied.

{¶26} The judgment of the Court of Common Pleas of Delaware County, Ohio is hereby affirmed.

By Farmer, P.J.

Hoffman, J. and

Delaney, J. concur.

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