[Cite as *State v. Clark*, 2011-Ohio-6310.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
FULTON COUNTY

State of Ohio — Court of Appeals No. F-10-025

Appellee — Trial Court No. 09CR000141

v.

James C. Clark — **DECISION AND JUDGMENT**

Appellant — Decided: December 9, 2011

* * * * *

Scott Haselman, Fulton County Prosecuting Attorney, and
Paul H. Kennedy, Assistant Prosecuting Attorney, for appellee.

Gregory L. VanGunten, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶1} Appellant, James C. Clark, appeals his conviction of felonious assault, a violation of R.C. 2903.11(A)(2) and a second degree felony. The conviction is pursuant to a jury verdict after a jury trial in August 2010 in the Fulton County Court of Common

Pleas. In an October 27, 2010 judgment, the trial court sentenced appellant to serve a four year prison term for the offense.

{¶2} Clark was indicted on September 21, 2009, in a single count indictment charging that on or about August 14, 2009, he "did knowingly cause or attempt to cause physical harm to another by means of a deadly weapon, to-wit, a knife * * *." The state has claimed that Christopher Cieslak was the victim of the assault.

{¶3} It is undisputed that Christopher Cieslak and Timothy Bell visited Clark at his residence on County Road 16-3 in Fayette, Fulton County, Ohio on the night of August 14, 2009. Bell drove. Clark and Bell were friends. Earlier, Clark had invited Bell to the house to see some recently completed work at the property – new cabinets, countertops, and split rail fencing. Bell called on the way and told Clark of plans he and Cieslak had for the evening. Clark told Bell to bring Cieslak along.

{¶4} When they arrived, Clark invited Bell and Cieslak into the house and walked them through the residence. Afterwards, they went outside to an exterior concrete patio located behind the house. Clark and Cieslak sat at a patio table and Bell went for beer. Clark testified that while Bell was gone he opened a bottle of Jack Daniel's Bourbon and Cieslak drank from it. When Bell returned with beer, they remained on the patio, drank, and listened to songs from a CD by Cieslak's band. Other visitors came and left by approximately 10 p.m.

{¶5} At trial, Clark and Cieslak had conflicting versions of events afterwards. Clark testified that after the visitors left he told Cieslak that he was not interested in investing in his band and that Cieslak became angry. Clark claimed that Cieslak argued with both him and Bell and that when Clark got up to leave the table, Cieslak bumped into the patio table, knocking down beer bottles in the process. Clark claims that Cieslak then grabbed him by the throat. Clark testified that in response he grabbed Cieslak's hair and pushed his head away to break Cieslak's hold of his neck. According to Clark, when he broke loose from Cieslak, Cieslak "flew over the chair, chair knocked down, he put his left hand out to try to brace it and he hit the back of his head."

{¶6} Clark testified that Cieslak then "came right back after me one more time and before he could grab me again I just threw him back down and * * * having a little a buzz, he tripped over the chair and hit the ground again." Clark also testified that he then told Bell twice to get his drunken friend out of there.

{¶7} According to Clark, he then went into the house to diffuse things and to give Bell an opportunity to get Cieslak to leave. From inside the house, Clark heard Bell urge Cieslak to leave, but saw Cieslak return to a chair at the patio table and sit down.

{¶8} Clark admits to grabbing a knife and approaching Bell and Cieslak with it. He testified that the knife was a paring knife, six to six and a half inches long. Clark admitted that he pointed the knife at Cieslak. According to Clark, "I just wanted to scare him with the knife and just get him out of there." According to Clark, Cieslak grabbed

for the knife and injured his right hand as a result. Clark testified that he pushed Cieslak when Cieslak grabbed for the knife. When Bell repeatedly yelled stop, Clark returned to the house. Bell and Cieslak then left.

{¶9} Clark denied stabbing Cieslak with the knife. He testified that there was broken glass from beer bottles on the concrete patio surface. When he cleaned up afterwards, he noticed blood on the broken glass.

{¶10} Cieslak testified to an entirely different set of events. According to Cieslak, it was Clark who expressed an interest in investing in a music project, even stating he wanted to invest $1 million in Cieslak's band. Cieslak claimed that Clark became increasingly excited and animated.

{¶11} Cieslak testified that he did not pursue any discussion of an investment by Clark in the band and told Clark that he could not, without talking to others in the band. According to Cieslak, at some point Clark stood up from the table, grabbed Cieslak by the head, and began shaking his head, saying no one disrespects him "at his yard." Clark then threw Cieslak down on the ground, knocking over Cieslak's chair and smashing his head against the patio's concrete surface in the process. Cieslak testified that Clark then went into the house.

{¶12} According to Cieslak, as he was standing on the patio and checking out his injuries, Clark approached from behind. Cieslak heard Bell yell out in warning, turned, and saw Clark jumping at him with a knife from the back porch. Cieslak testified that he

ducked, closed his eyes, and felt Clark push the knife into his left cheek. Cieslak grabbed the knife to pull it away from his cheek. In the struggle, Clark twisted the knife, cutting Cieslak's hand. Cieslak also testified that Clark then plunged the knife into his right chest.

{¶13} Cieslak testified that Bell screamed after the stabbing and Clark ran back inside the house. Cieslak and Bell then left the premises together. Cieslak also denied there was broken glass on the patio.

{¶14} Tim Bell also testified at trial. Bell claimed he saw Clark return from inside the house with a knife, with a blade six to eight inches long. Clark testified that he first saw the knife when Clark was on the patio.

{¶15} Bell testified that he saw Clark approach Cieslak with the knife, but that his view of the incident was from Clark's back. Bell testified that he could tell that Clark used the knife against Cieslak and that he yelled stop. Clark then stopped. According to Bell, Cieslak did not fall to the ground, but remained standing during the incident.

{¶16} Photographs depicting the interior and exterior of the house, including the patio, were placed in evidence at trial.

{¶17} In his single assignment of error on appeal, Clark asserts the trial court erred with regard to jury instructions:

{¶18} "The trial court violated R.C. 2945.11, and committed prejudicial error in failing to properly instruct the jury on all matters of law necessary for the information of the jury in giving its verdict, thereby denying defendant his due process rights."

Self-Defense

{¶19} Under the assigned error, appellant argues first that the trial court erred in failing to instruct the jury on the common law defense of self-defense of person and property and in failing to instruct the jury of a statutory presumption of self-defense under R.C. 2901.05.

{¶20} The state argues that no issue of self-defense was presented under the facts. The state contends that appellant did not have a bona fide belief that he was in imminent danger of harm from Cieslak when he approached Cieslak with a knife. At the time Cieslak was not attempting to enter the house or damage the home, but instead was outside on the patio. The state further argues that use of a knife was not a reasonable means to eject Cieslak from the premises.

{¶21} Self-defense is an affirmative defense and the defendant carries the burden to prove self-defense by a preponderance of the evidence. *State v. Jackson* (1986), 22 Ohio St.3d 281, 283; *State v. Braylock*, 6th Dist. No. L-08-1433, 2010-Ohio-4722, ¶ 21-23; R.C. 2901.05(A).

{¶22} To establish self-defense, a defendant must prove that "(1) he 'was not at fault in creating the situation giving rise to the affray'; (2) he had 'a bona fide belief that

he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of * * * force'; and (3) he did not violate 'any duty to retreat or avoid the danger.' *State v. Robbins* (1979), 58 Ohio St.2d 74, paragraph two of the syllabus. The elements of self-defense are cumulative. Thus, '[i]f the defendant fails to prove any one of these elements by a preponderance of the evidence he has failed to demonstrate that he acted in self-defense.' *State v. Jackson* (1986), 22 Ohio St.3d 281, 284. See, also, *State v. Williford* (1990), 49 Ohio St.3d 247, 249." *State v. Caudill*, 6th Dist. No. WD-07-009, 2007-Ohio-1557, ¶ 82.

{¶23} "The proper standard for determining in a criminal case whether a defendant has successfully raised an affirmative defense under R.C. 2901.05 is to inquire whether the defendant has introduced sufficient evidence, which, if believed, would raise a question in the minds of reasonable men concerning the existence of such issue." *State v. Melchior* (1978), 56 Ohio St.2d 15, paragraph one of syllabus.

{¶24} Appellant's own trial testimony demonstrated that he did not believe he was in any imminent danger of bodily harm when he approached appellant with a knife. As such a belief is an element of self-defense of the person, appellant's claim of self-defense of the person fails.

{¶25} Deadly force cannot be used to simply eject a trespasser or to defend one's property as it is available only when a person reasonably fears death or great bodily harm. *State v. LeFevere* (May 4, 1995), 10th Dist. No. 94APA09-1376; *State v. Richmond* (Feb.

2, 1990), 6th Dist. No. 88WM000016; *State v. Daugherty* (1971), 26 Ohio App.2d 159, 162. As the evidence at trial demonstrated that appellant approached Cieslak from the safety of the house without fear for his safety but with a desire to scare Cieslak into leaving the premises, the evidence did not support the affirmative defense of self-defense of his property.

{¶26} We also agree with the trial court that no statutory presumption of self-defense existed under R.C. 2901.05(B)(2). The statute applies to use of defensive force "if the person against whom the defensive force is used *is in the process of* unlawfully and without privilege to do so *entering, or has* unlawfully and without privilege to do so *entered the residence* or vehicle occupied by the person using the defensive force." (Emphasis added.) The statute defines residence as a "dwelling in which a person resides either temporarily or permanently or is visiting as a guest." R.C 2901.05(D)(3). Such a dwelling includes an attached porch. R.C. 2901.05(D)(2).

{¶27} We agree, however, with the trial court that the evidence at trial demonstrated that the altercation between Clark and Cieslak occurred on the patio and not in the residence or dwelling as defined by the statute. Cieslak also was not in the process of unlawfully entering the residence at the time. Accordingly, in our view appellant failed to establish the necessary facts to support the existence of the statutory presumption of self-defense under R.C. 2901.05(B).

{¶28} We conclude that appellant failed to introduce sufficient evidence at trial, which if believed, supports a conclusion by reasonable minds that he acted in self-defense of person or property or of the existence of circumstances presenting a presumption of self-defense under R.C. 2901.05(B). Accordingly, we conclude that the trial court did not err in failing to instruct on self-defense or the statutory presumption of self-defense under R.C. 2901.05(B).

Failure to Instruct that Act of Pointing Deadly Weapon
Alone Insufficient to Convict

{¶29} Appellant argues that the trial court erred by not instructing the jury that under the decision of *State v. Brooks* (1989), 44 Ohio St.3d 185, 192 the act of pointing a deadly weapon at another, alone, is insufficient evidence to convict a defendant of felonious assault.

{¶30} We review a trial court's refusal to give a requested jury instruction under an abuse of discretion standard. *State v. Wolons* (1989), 44 Ohio St.3d 64, 68; *State v. Martens* (1993), 90 Ohio App.3d 338, 343. The term abuse of discretion "implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157-158.

{¶31} The charge in *Brooks* was that the defendant attempted to cause physical harm to another in violation of R.C. 2903.11, felonious assault. *Brooks*, 44 Ohio St.3d at 187-188.The Ohio Supreme Court held in *Brooks* that the pointing of a revolver at another, considered alone, was an equivocal act and an insufficient basis to convict a

defendant of felonious assault. Id. The court distinguished other circumstances where the defendant went further:

{¶32} "In this case, there would be little doubt that a reasonable jury could convict the defendant of felonious assault if he had pointed his revolver at Barker and either fired or attempted to discharge his weapon in her direction." Id.

{¶33} Unlike in *Brooks*, this is not a case charging attempted physical harm without sufficient evidence of an overt act. The state did not argue at trial for a conviction based upon pointing of a knife. It argued for a conviction based upon evidence that appellant attacked Cieslak with a knife, injured his hand with the knife, and stabbed him in the chest. Under these circumstances, we find no abuse of discretion in the trial court's denying a requested instruction under *Brooks* that pointing a deadly weapon alone is insufficient to convict for felonious assault.

Failure to Give Missing Witness Instruction

{¶34} Appellant contended at trial that Cieslak injured his hand by grabbing at the knife and that Cieslak's other injuries were not knife wounds, but injuries caused by falling on broken glass. The state did not call any medical witness to testify at trial on whether Cieslak's injuries were caused by a knife. Cieslak's and appellant's testimony on the issue directly conflicted.

{¶35} Appellant requested the trial court to instruct the jury that they could draw an inference, adverse to the state, from the failure of the state "to call, either on direct or

rebuttal, any medical expert to testify that any of the wounds sustained by Mr. Cieslak were indeed cause by a knife." Although the trial court refused to give the requested instruction, it did permit appellant to argue for such an inference in closing argument.

{¶36} The requested instruction is a missing witness instruction and is based upon the analysis that "failure to call an available witness who is within one party's control and has knowledge pertaining to a material issue may, if not satisfactorily explained, lead to an inference or presumption that the witness' testimony would have been adverse to that party." Annotation, Adverse Presumption or Inference Based on State's Failure to Produce or Examine Law Enforcement Personnel-Modern Cases (1990), 81 A.L.R.4th 872, Section 2(a). (Citations omitted.) See *Silveous v. Rensch* (1969), 20 Ohio St.2d 82, paragraph one of the syllabus.

{¶37} The record reflects that Cieslak was treated at St. Anne Mercy Hospital in Toledo, Ohio for his injuries and that appellant received copies of Cieslak's medical treatment records during the course of discovery. It is not claimed that the state retained an expert medical witness to testify on the issue of causation of Cieslak's wounds and failed to call the expert as a witness. Instead, appellant argues that an adverse inference arises due to the state's failure to call Cieslak's treating physicians to testify at trial on causation of injuries.

{¶38} The grant or denial of such a jury instruction is subject to review on appeal under an abuse of discretion standard. *State v. Fitch* (Apr. 17, 1998), 6th Dist. No. L-97-

1316; *State v. Frost* (1984), 14 Ohio App.3d 320, 322. We find no abuse of discretion in the trial court's denial of the requested instruction. "In a criminal case, no inference arises from the failure of the state to call a witness accessible to both sides to prove a fact material to its case." *State v. Daugherty*, supra, at paragraph two of the syllabus. A defendant seeking a missing witness instruction must demonstrate that the witness was in the particular power of the state to control. *State v. Bell*, 8th Dist. No. 87769, 2006-Ohio-6592, ¶ 50; *State v. Melhado*, 10th Dist. No. 02AP-458, 2003-Ohio-4763, ¶ 51.

{¶39} In our view, Cieslak's treating physicians bore no special relationship with the state such that they may be considered within the particular power of the state to present as witnesses at trial. Both appellant and the state held the power to subpoena treating physicians to testify at trial. Accordingly, we conclude the trial court acted within its discretion in denying the request for a missing witness instruction.

Failure to Instruct on Aggravated Assault

{¶40} Appellant's final argument is that the trial court erred in failing to instruct the jury on the inferior offense of aggravated assault. Appellant admits that he did not request an instruction on aggravated assault at trial and raises the issue now as plain error.

{¶41} Appellant was indicted on, and convicted of, the offense of felonious assault in violation of R.C. 2903.11(A)(2).

{¶42} The Ohio Supreme Court recognized in 1988, in *State v. Deem* (1988), 40 Ohio St.3d 205, paragraph four of the syllabus, that the offenses felonious assault (in

violation of R.C. 2903.11) and aggravated assault (in violation of R.C. 2903.12) have identical elements except for the "the additional mitigating element of serious provocation" for aggravated assault. At the time of the indicted offense, the statutes maintained that relationship. R.C. 2903.11(A)(2) provided:

{¶43} "Felonious assault

{¶44} "(A) No person shall knowingly do either of the following:

{¶45} " * * *

{¶46} "(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance."

{¶47} At the time of the indicted offense, R.C. 2903.12(A)(2) provided:

{¶48} "Aggravated assault

{¶49} "(A) No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly:

{¶50} " * * *

{¶51} "(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code."

{¶52} The Supreme Court instructed in *Deem* "in a trial for felonious assault, where the defendant presents sufficient evidence of serious provocation, an instruction on aggravated assault must be given to the jury." *Deem*, paragraph four of the syllabus.

{¶53} In *Deem*, the Ohio Supreme Court identified the requirements to find serious provocation for aggravated assault:

{¶54} "Provocation, to be serious, must be reasonably sufficient to bring on extreme stress and the provocation must be reasonably sufficient to incite or to arouse the defendant into using deadly force. In determining whether the provocation was reasonably sufficient to incite the defendant into using deadly force, the court must consider the emotional and mental state of the defendant and the conditions and circumstances that surrounded him at the time. (*State v. Mabry* [1982], 5 Ohio App.3d 13, 5 OBR 14, 449 N.E.2d 16, paragraph five of the syllabus, approved.)" *Deem*, paragraph five of the syllabus.

{¶55} Recently, in *State v. Lynn*, 129 Ohio St.3d 146, 2011–Ohio–2722, ¶ 13 the Ohio Supreme Court outlined limitations on appellate courts with respect to claims of plain error:

{¶56} "Crim.R. 52(B) states that '[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.' Thus, there are 'three limitations on a reviewing court's decision to correct an error despite the absence of a timely objection at trial. First, there must be an error, i.e., a deviation from a

legal rule. * * * Second, the error must be plain. To be "plain" within the meaning of Crim.R. 52(B), an error must be an "obvious" defect in the trial proceedings. * * * Third, the error must have affected "substantial rights." We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial.' *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240."

{¶57} In our view, even had appellant requested an instruction on aggravated assault at trial, the motion should have been denied. Appellant did not present sufficient evidence to warrant a jury instruction on aggravated assault. Although appellant argues that there was evidence that he acted in anger, he has not presented any argument supporting a finding of serious provocation to use deadly force and we find none. Evidence is lacking of any conduct by Cieslak that reasonably could be understood to be of the type that could bring on extreme stress and provoke appellant under the circumstances to use deadly force. We find no error in failing to instruct on the offense of aggravated assault.

{¶58} We find appellant's assignment of error not well-taken.

{¶59} On consideration whereof, the court finds that appellant was not prejudiced or prevented from having a fair trial. The judgment of the Fulton County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE