[Cite as *State v. Brown*, 2004-Ohio-5863.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 83976

STATE OF OHIO	:	
	:	JOURNAL ENTRY
Plaintiff-Appellee	:	
	:	AND
vs.	:	
	:	OPINION
MARCELOUS BROWN	:	
	:	
Defendant-Appellant	:	
	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION	:	NOVEMBER 4, 2004
	:	
CHARACTER OF PROCEEDINGS	:	Criminal appeal from
	:	Common Pleas Court
	:	Case No. CR-434696
	:	
JUDGMENT	:	AFFIRMED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

For plaintiff-appellee: WILLIAM D. MASON, ESQ.
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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Marcelous Brown appeals his conviction and sentence handed down by the Cuyahoga County Court of Common Pleas, Criminal Division, for failure to comply with an order/signal, in violation of R.C. 2921.33; felonious assault, in violation of R.C. 2903.11; and possession of criminal tools, in violation of R.C. 2923.24. After a review of the record and arguments of the parties, we affirm the conviction and sentence for the reasons set forth below.

{¶ 2} On or about December 14, 2002, two unmarked Cleveland police cars entered the parking lot of a Marathon gas station at East 140th Street and St. Clair Avenue. The officers involved witnessed appellant near the passenger window of a pick-up truck that was parked at a gas pump. Because the area was known to be a high drug trafficking area, the detectives approached the pick-up truck to investigate.

{¶ 3} Appellant, upon catching sight of the detectives, walked immediately to his Bronco truck and attempted to leave the scene. When the officers identified themselves, appellant drove out of the gas station, forcing Officer Louis Vertosnik to move out of the way of appellant's vehicle to avoid being struck. Appellant maintains that the near-miss was an accident, but the officer contends that appellant aimed the vehicle directly at him when driving away. A high-speed chase and subsequent foot pursuit then ensued, and appellant was eventually apprehended.

{¶ 4} Appellant presents four assignments of error in his merit brief for our review. Appellant also filed a "Supplement to Defendant-Appellant's Brief and Assignment of Errors," with one additional assignment of error.

{¶ 5} "I. THE TRIAL COURT'S (sic) ERRED IN FAILING TO EXCLUDE THE VIDEOTAPE SURVEILLANCE RECORDED BY OFFICER DUNN."

{¶ 6} Pursuant to Crim.R. 16(B)(1)(c), the prosecution has the obligation of permitting the defendant to "inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, available to or within the possession, custody or control of the state, and which are material to the preparation of his defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant." The purpose of Crim.R. 16 is to prevent surprise and the secreting of evidence favorable to one party. *Lakewood v. Papadelis* (1987), 32 Ohio St.3d 1, 3, 511 N.E.2d 1138. If there is a failure to comply with this discovery rule, the trial court may grant a continuance, preclude the prosecution from calling that witness, or make "such other order it deems just under the circumstances." Crim.R. 16(E)(3). A trial court must inquire into the circumstances producing the alleged violation of Crim.R. 16 and then impose the least severe sanction that is consistent with the purpose of the rules of discovery. *Papadelis*, supra, paragraph two of the syllabus.

{¶ 7} The imposition of sanctions for discovery violations is within the discretion of the trial court. *State v. Harcourt* (1988), 46 Ohio App.3d 52, 54, 546 N.E.2d 214. An abuse of discretion is more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Clark* (1994), 71 Ohio St.3d 466, 470, 644 N.E.2d 331; *State v. Moreland* (1990), 50 Ohio St.3d 58, 61, 552 N.E.2d 894; *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144. In order to create an abuse of discretion, the result must be so palpably and grossly violative of fact or logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance of judgment, not the exercise of

reason but instead passion or bias. *Nakoff v. Fairview Gen. Hosp.* (1996), 75 Ohio St.3d 254, 256, 662 N.E.2d 1. Moreover, when applying the abuse of discretion standard, a reviewing court is not free to merely substitute its judgment for that of the trial court. *In re Jane Doe I* (1991), 57 Ohio St.3d 135, 138, 566 N.E.2d 1181; *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169, 559 N.E.2d 1301.

{¶ 8} Appellant argues that the videotape evidence of the police pursuit of the defendant was admitted in error because the prosecution failed to disclose the tape's contents prior to the day of trial. However, to demonstrate that the trial court abused its discretion in allowing the tape to be played for the jury, the defendant must show that (1) the prosecution's failure to disclose was a willful violation of the rule, (2) foreknowledge of the evidence in question would have benefitted the accused in preparation of his defense, or (3) the accused was unduly prejudiced by the admission. *State v. Bidinost* (1994) 71 Ohio St.3d 449, 456, *citing State v. Parson* (1983) 6 Ohio St.3d 442, 445.

{¶ 9} In the instant case, there seems to be some discrepancy as to whether defense counsel was made aware of the tape's existence prior to trial. Appellant asserts that the prosecution did not produce the tape until the day of trial; however, the record reflects defense counsel's acknowledgment that he was made aware during pretrial discussions that "there was a possibility that some of [the events leading to appellant's arrest] may be on videotape." (Tr. at 116.) In addition, trial counsel acknowledges that, in a sidebar during trial, the prosecutor showed him the tape "the other day." (Tr. at 383.) Further, the videotape documented the events leading up to appellant's arrest, to which several police officers also testified. Therefore, it cannot be said that the showing of the videotape was prejudicial to defendant because the testimony of eye witnesses to the same events was properly admitted. Finally, it cannot be said that the outcome of appellant's trial would have

been different but for the admission of the videotape. Thus, we find no abuse of discretion in the trial court's admission of the videotape, and this assignment of error is overruled.

{¶ 10} Assignments of error II and III are substantially interrelated; therefore, for the sake of judicial economy, we will address them together.

{¶ 11} "II. THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE DEFENSE OF DURESS."

{¶ 12} "III. THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE DEFENSE OF ACCIDENT."

{¶ 13} Generally, it is the duty of the trial judge in a jury trial to state all matters of law necessary for the information of the jury in giving its verdict. R.C. 2945.11. Correct and pertinent requests to charge the jury must be given by the trial judge, either as specifically proposed or within the substance of a general charge. *State v. Perryman* (1976), 49 Ohio St.2d 14, 3 O.O.3d 8, 358 N.E.2d 1040.

{¶ 14} We review both of these assignments of error for abuse of discretion.

{¶ 15} An accident is that which is unintentional and unwilled and implies a lack of criminal culpability. *State v. Ross* (1999), 135 Ohio App.3d 262, 733 N.E.2d 659. An accident will be found only if the defendant's actions or the resulting injury were a "mere physical happening or event, out of the order of things and not reasonably [anticipated or foreseen] as a natural or probable result of a lawful act." *State v. Bowling*, Cuyahoga App. No. 80777 at 10, 2002-Ohio-6818, ¶16, quoting *State v. Glossip* (Mar. 18, 1991), Butler App. No. CA90-07-138, (citing 4 Ohio Jury Instructions 75, Section 411.01[2]). The defense of accident is not an affirmative defense, but is tantamount to a denial that an unlawful act was committed; it is not a justification for the defendant's admitted

conduct. *Jones v. State* (1894), 51 Ohio St. 331, 342, 38 N.E. 79; *State v. Atterberry* (1997), 119 Ohio App.3d 443, 447 citing *State v. Poole* (1973), 33 Ohio St.2d 18, 294 N.E.2d 888. Absent evidence in the record, the trial court need not instruct the jury with regard to accident. *State v. Long* (1978), 53 Ohio St.2d 91; *State v. Dale* (1982), 3 Ohio App.3d 431; *State v. Hipkins* (1982), 69 Ohio St.2d 80.

{¶ 16} Unlike accident, duress is an affirmative defense under Ohio law. *State v. Sappienza* (1911), 84 Ohio St. 63, 95 N.E. 381; *Takacs v. Engle* (1985), 768 F.2d 122, 126. As such, the defendant carries the burden of going forward with the evidence of duress, and the burden of proving duress by a preponderance of the evidence. See R.C. 2901.05(A). To prove duress, defendant must show that he was forced to perform the act in question against his will by an immediate and continuous threat of grave danger during the entire time that the act was being committed. *State v. Good* (1960), 110 Ohio App. 415, 419, 165 N.E.2d 28. Before the trial court instructs the jury on the defense of duress, it must find as a matter of law that evidence presented is sufficient to warrant an instruction on duress. *State v. Cross* (1979), 58 Ohio St.2d 482, 488, 391 N.E.2d 319.

{¶ 17} Appellant argues that he was entitled to jury instructions on both "accident" and "duress." We disagree. Appellant argues that he was entitled to an instruction on duress because, on the evening in question, officers approached him "late in the evening, in a high-crime area." Appellant does not demonstrate, however, what evidence was presented at trial to substantiate appellant's claim here that he was forced to effectuate a felonious assault due to an immediate and continuous threat of grave danger. He cites to the testimony of Darrick Nation, a witness to the events in question and the only witness called by the defense. Mr. Nation testified that he was on a date with the appellant's cousin, with whom he was still involved at the time of trial, when they

received a phone call and decided to meet the appellant at the gas station at East 140th and St. Clair. Nation testified that when they arrived, an unmarked car pulled up and a white male jumped out of the car and pointed a gun at appellant, who "looked kind of scared" and headed for his automobile parked a few feet away. This is the only reference to appellant's state of mind or intent at the time of the incident; Nation further testified that the appellant said nothing during the confrontation with police and acted calmly.

{¶ 18} The police officers involved in the incident, however, testified that they were investigating the gas station on East 140th Street in an unmarked police "detective's" car because of numerous complaints of drug activity in the area. The police testified that when they pulled up to the station on the night in question, they observed appellant leaning into the passenger window of a white truck. When Detectives Vertosnik and Purcell exited their vehicle to question appellant, testimony reflects that appellant did not comply with the officers' requests to stop and approach the police car. Instead, appellant walked toward his vehicle, got in, and drove his Ford Bronco directly at Officer Vertosnik, causing him to jump out of the way. During this confrontation, several more police officers arrived on the scene, also in "detective's" cars, and the officers began pursuing appellant with their lights and sirens activated. Several marked "black and white" police cars also joined the pursuit before appellant was apprehended. The officers also testified that the detectives in the unmarked police cars were wearing jackets and/or hats that said "police" or "Sixth District Vice," that their badges were clearly visible, and that they identified themselves as police officers when asking appellant to approach their car.

{¶ 19} Trial counsel argued that appellant was put in fear for his life when he was approached by police because he was unaware they were police officers, and he thought they were

there to rob or otherwise injure him. Yet the record does not reflect any evidence presented that appellant was in fear of his life or perceived himself in grave danger at any time; arguments of counsel are, of course, not evidence the jury may consider. Therefore, we find that appellant presented insufficient evidence at trial to warrant an instruction on duress, and the trial court did not abuse its discretion in declining to instruct the jury on the affirmative defense of duress.

{¶ 20} Appellant also requested an instruction on "accident," which was denied over trial counsel's objection. Appellant argues that he did not drive his Bronco directly at Detective Vertosnik, but that his vehicle "fishtailed" as a result of the winter driving conditions. However, testimony reflected that the appellant first drove his car at the detective, who jumped out of the way, and then the Bronco fishtailed, causing the officer to move again. Therefore, we cannot find that the trial court abused its discretion in failing to issue an instruction on accident because the evidence did not support such an instruction. Accordingly, appellant's second and third assignments of error are overruled.

{¶ 21} "IV. THE CONVICTION OF THE DEFENDANT-APPELLANT FOR THE OTHER CHARGE OF FELONIOUS ASSAULT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 22} The standard employed when reviewing a claim based upon the weight of the evidence is not the same standard to be used when considering a claim based upon the sufficiency of the evidence. Instead, "the [appellate] court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Martin* (1983), 20

Ohio App.3d 172,175, 485 N.E.2d 717, citing *Tibbs v. Florida*, (1982), 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 752.

{¶ 23} After a review of the record in its entirety, we cannot find that this jury lost its way. Six police officers testified consistently as to the purpose for their appearance on the scene, appellant's response to their instructions and the ensuing chase. We find their recitation of events credible. Appellant's only witness, Nation, testified that he witnessed the scene from a position near the convenience store adjacent to the gas station, behind the officers involved. He was not at a vantage point to witness the entire exchange, and he did not witness the subsequent chase. Therefore, we find that the verdict is not against the manifest weight of the evidence, and appellant's fourth assignment of error is overruled.

{¶ 24} "V. THE TRIAL COURT ERRED WHEN IT INSTRUCTED THE JURY ON FLIGHT WHICH IS PLAIN ERROR."

{¶ 25} Finally, appellant assigns error with regard to the jury instruction given on flight, which was requested by the state. While evidence of flight in and of itself does not raise a presumption of guilt, the jury may consider that evidence in their determination of guilt or innocence where the trial court instructs it accordingly. *State v. Bostick*, Cuyahoga App. No. 82933, 2004-Ohio-1902. Evidence of flight is admissible as tending to show consciousness of guilt. *State v. Eaton* (1969), 19 Ohio St.2d 145, 160, 48 Ohio Op.2d 188, 249 N.E.2d 897, vacated on other grounds (1972), 408 U.S. 935; *State v. Williams*, 79 Ohio St.3d 1, 26, 1997-Ohio-407, 679 N.E.2d 646. It is well within a trial court's discretion to issue an instruction on flight if sufficient evidence exists in the record to support the charge. *State v. Benjamin*, Cuyahoga App. No. 80654, 2003-Ohio-281, ¶29, ¶31.

{¶ 26} We review this assignment for plain error since defense counsel did not object to the instruction at trial. To constitute plain error, the error must be on the record, palpable, and fundamental, so that it should have been apparent to the trial court without objection. See *State v. Tichon* (1995), 102 Ohio App.3d 758, 767, 658 N.E.2d 16. Moreover, plain error does not exist unless the appellant establishes that the outcome of the trial clearly would have been different but for the trial court's allegedly improper actions. *State v. Waddell* (1996), 75 Ohio St.3d 163, 166, 661 N.E.2d 1043; *State v. Nolling*, 98 Ohio St.3d 44, 2002-Ohio-7044, 781 N.E.2d 88. Notice of plain error is to be taken with utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Phillips* (1995), 74 Ohio St.3d 72, 83, 656 N.E.2d 643.

{¶ 27} A defective jury instruction does not rise to the level of plain error unless it can be shown that the outcome of the trial would clearly have been different but for the alleged error. *State v. Campbell* (1994), 69 Ohio St.3d 38, 630 N.E.2d 339; *Cleveland v. Buckley* (1990), 67 Ohio App.3d 799, 588 N.E.2d 912. Moreover, a single challenged jury instruction may not be reviewed piecemeal or in isolation, but must be reviewed within the context of the entire charge. See, *State v. Hardy* (1971), 28 Ohio St.2d 89, 276 N.E.2d 247; *State v. Fields* (1984), 13 Ohio App.3d 433, 469 N.E.2d 939.

{¶ 28} We find no plain error in the jury charge, as a whole. The evidence in this case clearly supported a jury instruction on flight, and we cannot find that the instruction created reversible error. As discussed above, appellant was involved in a high speed motor vehicle chase and then led police on a pursuit by foot for an additional three hundred yards. It can be reasonably inferred that appellant engaged in this behavior to avoid apprehension by police. Moreover, appellant characterizes the instruction on flight as "superfluous," but fails to demonstrate how its

issuance prejudiced him or otherwise rises to the level of a manifest miscarriage of justice. Therefore, his final assignment of error is overruled.

{¶ 29} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal. It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

FRANK D. CELEBREZZE, JR.
PRESIDING JUDGE

DIANE KARPINSKI, J., AND

ANTHONY O. CALABRESE, JR., J., CONCUR.