[Cite as *State v. Betliskey*, 2015-Ohio-1821.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101330

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

BRANDON BETLISKEY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-579201-C

BEFORE: Blackmon, J., Jones, P.J., and Keough, J.

RELEASED AND JOURNALIZED: May 14, 2015

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PATRICIA ANN BLACKMON, J.:

{¶1} Appellant Brandon Betliskey appeals his conviction and assigns the following errors for our review:[1]

{¶2} Having reviewed the record and pertinent law, we affirm Betliskey's convictions. The apposite facts follow.

{¶3} On November 1, 2013, the Cuyahoga County Grand Jury indicted Betliskey along with two codefendants for crimes stemming from two altercations in the vicinity of West 99th and 100th Streets in Cleveland, Ohio. The altercations resulted in Betliskey stabbing Frank Scheussler, Sr. three times in the shoulder and once in the stomach. As a result of the second altercation, the grand jury charged Betliskey with one count of attempted murder and two counts of felonious assault. Betliskey pleaded not guilty at his arraignment, the trial court appointed counsel for his defense, and after several pretrial conferences, a jury trial commenced.

Jury Trial

{¶4} At trial, through the testimony of 11 state witnesses, along with Betliskey who testified in his own defense, the following undisputed evidence was established. In the late afternoon of September 25, 2013, a neighbor observed two of Betliskey's sisters, Jenna Donahue and Angela Betliskey, chasing a young boy down West 100th Street. At the time, Betliskey's sisters were in a red Pontiac Grand Am chasing the young boy, who was attempting to flee on foot. The young boy scaled the fence of one of Scheussler's

[1]See appendix.

neighbor's house and disappeared. Betliskey's sisters exited their vehicle, began pulling on the fence and attempted to climb over.

{¶5} Scheussler Sr., observing Betliskey's sisters attempting to climb the fence, walked over and told them to stop. After unpleasant words were exchanged, one of Betliskey's sisters punched Scheussler, Sr. in the face. As the other sister was about to throw a punch, Scheussler Sr.'s wife, Robin, stepped between them and a melee ensued. The Scheusslers' son, Frank, Jr., appeared on the scene, pulled the girls off his mother, and punched both sisters. More unpleasant words were exchanged, Betliskey's sisters drove away and the Scheusslers walked back to their home.

{¶6} As the Scheusslers were walking back to their home, they flagged down a police cruiser and informed the officers about Betliskey's sisters chasing the young boy, and also about the altercation. After a few minutes, the officers found the red Pontiac Grand Am and spoke with Betliskey's sisters, who indicated that they did not want to press charges. The officers advised Betliskey's sisters to stay away from the Scheusslers.

{¶7} The officers returned to the Scheusslers' house, and after a brief discussion, the Scheusslers also agreed that they would not press charges against Betliskey's sisters. The officers advised the Scheusslers that they too should refrain from confronting Betliskey's sisters.

{¶8} About an hour later, Betliskey arrived home from work and learned of the earlier altercation. Betliskey, along with Donahue, the older of his two sisters that were

involved in the earlier incident, his stepsister, Dawn Damato, and her fiancé, Danny Torres, headed in the direction of the Scheusslers' home.

{¶9} It was at this juncture that the second altercation that is at the center of the instant appeal occurred. The testimony undisputedly established that it was then that Betliskey stabbed Scheussler, Sr., who underwent emergency surgery to repair a severed artery in his stomach. The testimony also established that it took approximately 30 staples to close the wound to Scheussler, Sr.'s stomach. In addition, the testimony established that Scheussler, Sr.'s wounds caused permanent scarring to his stomach, back, and shoulder, and required a five-day stay in the hospital.

{¶10} Because it is undisputed that Betliskey stabbed Scheussler, Sr., we will limit the remaining recitation of the facts to the witnesses' divergent testimonies.

{¶11} According to Scheussler Sr., after the first altercation, his wife went to Chick-fil-A to pick up dinner. Scheussler Sr. testified that upon his wife's return and as they were about to start eating, he noticed four people walking up their driveway. Scheussler Sr., testified in pertinent part, as follows:

> Q. What happened once you saw these individuals?
>
> A. Brandon kind of just, he came right up to the steps and that, there was no talking about nothing. He kind of, foot up on the steps, he threw a right arm at me, I blocked the right arm, with his left arm he hit me with some type of metal object. Brass knuckles, the knife itself, I'm not sure what it was, but it knocked me out, is what it did.
>
> Q. Now, when Mr. Betliskey came up to the stairs, where were you?

A. I was standing on my porch all the way at the top, like next to the pillar on the — if you're looking at the steps, I was at the right-hand pillar there.

Q. Were you at the pillar closest to the driveway?

A. No, the next one.

Q. So the pillar, the next pillar over?

A. Correct, yeah.

Q. And you said Mr. Betliskey hit you with something metal?

A. Correct.

Q. And this knocked you out?

A. Yeah. It actually took a chunk out of my face actually, and I believe I was knocked out and stuff. I don't know if I was still holding up on the rail or on the pillar.

Q. What happened after that?

A. Actually, I actually fell down to the porch. I don't know if I was pushed to the porch or if I fell over. And when I got up, I realized I had been stabbed three times.

Q. Where at?

A. In my back, twice in the shoulder and once in my back.

Tr. 359-360.

* * *

Q. Okay. So at the point you learned that you were stabbed in the back, what happened after that?

A. I actually got up. I was on the floor actually on my porch. And as I got up, I noticed the blood on my shoulder and felt the pain at that point, and he was still standing over me on my porch.

Q. And did you see a knife in his hand?

A. Yes, I did.

Q. How long would you say the knife was?

A. I only seen the tip of it. Maybe a few inches, three inches possibly, or —

Q. So at this point you see Mr. Betliskey, and are you standing up or laying down?

A. I was laying down at that point still. When I saw him and saw the knife in his hand still and him standing over me, I grabbed the broken chair that I fell onto and I went to try to defend myself with the chair, and he ended up taking the knife and running it right through the chair and stabbing me right in the stomach with it.

Tr. 361-362.

{¶12} According to Betliskey, when he arrived home from work on the day in question, he found his sisters emotionally distressed and standing on the front lawn. He learned that a fight had taken place earlier, ostensibly over a bike. Betliskey also claimed that one of his sisters, who was pregnant, indicated that she had started to bleed and believed she might be miscarrying. In addition, Betliskey noticed that his younger brother had a black eye, busted lip, and a bump on the back of his head. Further, Betliskey stated that he saw fist prints on the cheeks of his other sister.

{¶13} Betliskey testified that upon seeing the state of his siblings, he became very stressed and decided to go to the store to get something to drink. On the way to the store, he saw about five children riding bicycles towards West 100th Street. Betliskey yelled down the street to his sisters to have them verify if the children on the bikes were

involved. Betliskey's sister, stepsister, and her fiancé joined him and began walking in the direction of where the children on the bikes had gone. It was at this point that Betliskey came in contact with the Scheusslers.

{¶14} Betliskey testified in pertinent part as follows:

Q. Okay. And then at some point you get to the Schuessler residence; is that correct?

A. Well, right as we passed Almira, I noticed two males sitting on a porch, one looked back at us and pointed, the other one then looked back at us and then they both got up and went into the house.

Q. Okay. Go from there.

A. As we are approaching the residence, I kept my eye contact, I found it suspicious on why two gentlemen sitting on the porch pointed back at us and then go back in the house. So I kept my eye contact on the house. By the time we approached the front of the house, that is when somebody opened the front door. I then began to walk up the walkway to address this person, and they left and then two gentlemen stepped out.

Tr. 558.

* * *

Q. What happens then?

A. The two gentlemen then came out. I believe Sr. was the one that addressed, What are you guys doing at the front of my residence, and basically did we have a problem, you know, why are you guys in front of my yard. At that moment I was mad, I wanted to know who put their hands on my sisters and why. Then Jr. responded, yelling at Jenna, I believe. I didn't know at the time they knew each other. But he began yelling at Jenna and Danny responded, I believe, correcting him and how he was speaking to my sister.

Q. Let me stop you there for a second.

A. Okay.

Q. So did you hear what words were exchanged between —

A. No, I don't want to fill in the blanks. I'm not sure exactly, quote unquote, what the words were.

Q. So when you say, when you said that Jr. was saying something towards Jenna and Danny responded, what did you mean by "correcting him"?

A. The way he was speaking to my sister, I could tell that much, that it was more offensive, and I believe Danny was correcting him on how he was speaking to my sister.

Q. Like indicating that he's being rude to her?

A. Right. Right.

Q. Okay. So go on from there.

A. At that moment Jr. hauled off and hit Danny. My natural reaction was to help. Danny's more heavyset. He was pushing him up the stairs. So I ran up on the porch and I attempted to pull Jr. away from Danny. At that moment I was hit upside the head with a hard object. At the time I couldn't recall what it was.

Tr. 560-561.

* * *

Q. Let's just take a step back. So now you're on the porch. Danny and Jr. are engaged in an altercation on the porch. Do you have the knife out at that point?

A. Not at all.

Q. Then you just testified that you got hit in the head with a hard object?

A. Correct.

Q. Is the knife out before you get struck in the head?

A. Not at all.

Q. What happens next?

A. At that moment I was kind of stunned. Before I could even react, I was then hit again in the back of the head. This time, I mean, I remember standing there and in a very instant I was on the ground. I was floored.

Q. Okay. Well, what happens after that?

A. At that moment, there's a column right next to the stairwell, and it's connected to the railing, I pretty —

THE WITNESS: May I gesture?

THE COURT: Sure.

A. I tried to duck like this, and my knife — I had cargo pants on — my knife was kind of sticking out the top of the pocket, so I grabbed the knife and just began swinging the knife.

Q. Okay. Did you see what you were stabbing or who?

A. Not at all. I actually couldn't recall hitting anything.

Q. Okay.

A. I just wanted to stop from being hit with the chair.

Q. It wasn't until you got hit with that chair the second time do you pull the knife out, correct?

A. Correct.

Q. What happens next?

A. At that moment I was struck again with the chair, this time not in my head or back or anything, but I remember it catching my arm. At that time I grabbed the column and I tried pulling myself up. I was still weak and kind of dizzy. Amongst pulling myself up, Sr. then clinched my body and was holding me over the column. While

> holding me, I then began, I told him to get off me and I was just swinging the knife again.

Tr. 561-563.

{¶15} After the jury deliberated, it found Betliskey not guilty of attempted murder and of one of the two counts of felonious assault. The jury found Betliskey guilty of the remaining count of felonious assault. On April 2, 2014, the trial court sentenced Betliskey to seven years in prison and three years of postrelease control. The trial court also ordered Betliskey to pay court costs, a fine of $1,500, and restitution to Scheussler, Sr. in the amount of $3,991.21. Betliskey now appeals.

Jury Instruction on Aggravated Assault

{¶16} In the first assigned error, Betliskey argues the trial court erred when it failed to give a jury instruction on aggravated assault.

{¶17} A trial court's decision to grant or deny a requested jury instruction is reviewed under an abuse of discretion standard. *State v. Williams*, 8th Dist. Cuyahoga No. 90845, 2009-Ohio-2026, ¶ 50. A trial court abuses its discretion when it makes a decision that is unreasonable, unconscionable, or arbitrary. *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 34. A trial court is provided the discretion to determine whether the evidence adduced at trial was sufficient to require an instruction. *State v. Fulmer*, 117 Ohio St.3d 319, 2008-Ohio-936, 883 N.E.2d 1052, ¶ 72. Jury instructions must be viewed as a whole to determine whether they contain prejudicial error. *State v. Fields*, 13 Ohio App.3d 433, 436, 469 N.E.2d 939 (8th Dist.1984).

{¶18} In the instant case, Betliskey claimed self-defense, and the trial court instructed the jury on that defense. Nevertheless, Betliskey asked the trial court to instruct the jury on aggravated assault, but it declined to do so.

{¶19} In *State v. Deem*, 40 Ohio St.3d 205, 533 N.E.2d 294 (1988), the Ohio Supreme Court held that aggravated assault was an inferior degree of felonious assault because the elements were identical except for the additional mitigating element of provocation. Therefore, "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." *Id.* at paragraph four of the syllabus. To be considered serious, the provocation must be reasonably sufficient to bring on extreme stress and incite or arouse the defendant into using deadly force. *Id.* at paragraph five of the syllabus.

{¶20} "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." *Id.* In *State v. Shane*, 63 Ohio St.3d 630, 590 N.E.2d 272 (1992), the Ohio Supreme Court further determined the bounds of serious provocation, through the use of a two-part inquiry: (1) the provocation must be sufficient to arouse the passions of an ordinary person beyond the power of his or her control, and (2) the defendant in the particular case must actually be under the influence of sudden passion or in a sudden fit of rage. *Id.* at 634-635. Classic examples of serious provocation are assault and battery, mutual combat, illegal arrest, and discovering a spouse in the act of adultery. *Id.* at 635.

{¶21} Here, limiting the evidence concerning provocation to Scheussler, Sr.'s and Betliskey's testimony, we find the record devoid of any evidence that Scheussler, Sr. himself provoked Betliskey, to such a level as to be deemed serious provocation. Betliskey testified that when he was nearing the Scheussler's residence, he saw two men sitting on the porch, who pointed at him and his companions, then went into the house. Assuming that Scheussler, Sr. is the one who pointed at Betliskey, that alone could not have aroused the passion of an ordinary person beyond the power of his control. Betliskey testified that he found it suspicious that one of the men pointed at them, so he kept a watchful eye on them. Betliskey never testified that he was enraged. As such, we find nothing in Scheussler, Sr.'s action that would serve as the predicate for the provocation necessary to justify the requested jury instructions on aggravated assault.

{¶22} Nonetheless, Betliskey's claim that the injuries he observed on his siblings provided sufficient provocation to warrant the jury instruction on aggravated assault. However, as discussed above, the victim in this case was not the source of that provocation. At trial, Betliskey specifically testified that at time he made his way over to West 100th Street, he did not know who had caused the injuries to his siblings. Betliskey claimed at the time that he believed the situation involved children fighting over a bike. Based on Betliskey's own testimony, it would be hard to conceive that Betliskey even knew to whom his rage should be directed.

{¶23} In addition, the record reveals that Betliskey's siblings had minor injuries and one had none that was visible. Arguably, such minor injuries would not have

aroused the passion of an ordinary person beyond the power of his or her control. Further, the record indicates that there was not an insubstantial time between Betliskey seeing his siblings' minor injuries and when he encountered the Scheusslers. The record reveals that it was almost an hour after seeing his siblings' minor injuries that Betliskey crossed paths with the Scheusslers. On these facts, Betliskey has failed to demonstrate that he acted under serious provocation that was reasonably sufficient to incite him into using deadly force.

{¶24} Finally, Betliskey, before the trial court and on appeal, predicates his entire defense on a theory of self- defense. Such a theory is incompatible with a jury instruction on aggravated assault. *See State v. Cremeans*, 9th Dist. Summit No. 22009, 2005-Ohio-261, citing *State v. Loyed*, 8th Dist. Cuyahoga No. 83075, 2004-Ohio-3961, ¶ 11. *See also State v. Harris*, 129 Ohio App.3d 527, 534-35, 718 N.E.2d 488 (10th Dist.1998). Therefore, the circumstances of this case did not warrant such a jury instruction. Consequently, the trial court did not abuse its discretion in refusing to issue the instruction on aggravated assault. Accordingly, we overrule the first assigned error.

Jury Instructions on Defense of Another

{¶25} In the second assigned error, Betliskey argues the trial court erred when it failed to instruct the jury on defense of another when it gave the self-defense instructions.

{¶26} Defense of another is a variation of self-defense. *State v. Moss*, 10th Dist. Franklin No. 05AP-610, 2006-Ohio-1647. An actor is legally justified in using force only when the person he is aiding would have been justified in using force to defend him or

herself. *See State v. Wilson*, 2d Dist. Montgomery No. 22581, 2009-Ohio-525, ¶ 38. In this respect, the defender of another person acts at his own peril; if the original person was not acting in self-defense, the defender is not allowed to employ force to protect that person. *State v. Abalos*, 6th Dist. Lucas No. L-09-1280, 2011-Ohio-3489, ¶ 14.

{¶27} A claim of self-defense, or defense of another where deadly force is used, requires the defendant to show he and the other person were not at fault in creating the situation giving rise to conflict; he had a bona-fide belief he or the person he was defending was in serious danger of death or great bodily harm which could only be avoided by use of deadly force; and he and the other person did not violate a duty to retreat or avoid the danger. *State v. Evans*, 5th Dist. Stark No. 2012-CA-00130, 2013-Ohio-1784 at ¶ 23, citing *State v. Williford*, 49 Ohio St.3d 247, 249, 551 N.E.2d 1279 (1990). A defendant need only provide evidence of a nature and quality sufficient to raise the defenses rather than prove the applicability of it by a preponderance of the evidence. *Id.*, citing *State v. Robinson*, 47 Ohio St.2d 103, 351 N.E.2d 88 (1976). If 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." *Id.*, quoting *State v. Jackson*, 22 Ohio St.3d 281, 284, 490 N.E.2d 893 (1986).

{¶28} In the instant case, Betliskey argues that the requested instructions should have been given because he came to the aid of Torres, his sister's fiancé, who was tussling with Scheussler, Sr.'s, son, Frank Jr. Betliskey testified that he pulled Frank off Torres. Here, the major problem with Betliskey's argument in support of the requested

jury instructions is that he used deadly force against Scheussler, Sr., who was not in fact the person tussling with Torres. In other words, Torres would not have been justified in using deadly force against Scheussler, Sr., whom he was not fighting.

{¶29} Further, even if Betliskey had attacked Frank Jr. instead of Scheussler, Sr., the record undisputedly established that Betliskey and Torres entered upon the Scheusslers' property without privilege to do so. Thus, Betliskey has not established that he was not at fault in creating the situation that arose. Moreover, there is nothing in the record to indicate that Betliskey had a bona-fide belief that he or Torres were in serious danger of death or great bodily harm that could only be avoided by use of deadly force. Accordingly, we overrule the second assigned error.

"At Fault" Jury Instructions

{¶30} In the third assigned error, Betliskey argues the "at fault" jury instructions were unconstitutionally vague. Specifically, Betliskey argues the jury was unable to understand the jury instructions under self-defense regarding whether he was "at fault" in creating the situation. Betliskey points out that after the jury's specific inquiry about "at fault," the trial court answered in writing that the jury had all the law. In addition, Betliskey points out that defense counsel failed to object.

{¶31} It bears repeating that in order to successfully utilize the affirmative defense of self-defense in a case where a defendant used deadly force, such as the case here, the defendant must prove all three of the following: (1) he was not at fault in creating the situation giving rise to the affray; (2) he had a bona fide belief he was in imminent danger

of death or great bodily harm and that his only means of escape from such danger was the use of deadly force; and (3) he did not violate any duty to retreat or avoid the danger. *State v. Batie*, 8th Dist. Cuyahoga No. 101234, 2015-Ohio-762, at ¶ 8, citing *Williford*, *supra*, 49 Ohio St.3d at 249, 551 N.E.2d 1279.

{¶32} The record indicates that the above black-letter law mimics the instructions given by the trial court, and it is the language Betliskey contends is unconstitutionally vague. Although we are cognizant that the Ohio Jury Instructions are not binding legal authority, it is significant that the trial court's instructions here are also consistent with the language from the Ohio Jury Instructions. *See State v. Garner*, 5th Dist. Stark No. 2009CA00286, 2010-Ohio-3891, ¶ 13-17, citing 4 Ohio Jury Instructions, Section 411.31 (2006); *State v. Jeffers*, 11th Dist. Lake No. 2007-L-011, 2008-Ohio-1894, ¶ 56-59, citing 4 Ohio Jury Instructions, Section 411.31 (2006); *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995, ¶ 97, (Lanzinger, J., dissenting).

{¶33} The Ohio Jury Instructions are also helpful as an example of the generally accepted interpretation of Ohio statutes. *See State v. Nucklos*, 171 Ohio App.3d 38, 2007-Ohio-1025, 869 N.E.2d 674, ¶ 57 (2d Dist.) (The Ohio Jury Instructions are a respected and authoritative source of the law, but it is merely a product of the Ohio Judicial Conference and not binding on the courts).

{¶34} Finally, insofar as Betliskey argues that these instructions were unconstitutionally vague on their face, we decline to find this when the Supreme Court of Ohio and Ohio Jury Instructions have endorsed the same language. Therefore, we find

that the jury instructions were a correct statement of the law. Accordingly, we overrule the third assigned error.

Jury Instructions on Duty to Retreat

{¶35} In the fourth assigned error, Betliskey argues the trial court erred by giving a duty to retreat instructions.

{¶36} As previously discussed, Betliskey requested and received a self- defense jury instruction. The duty to retreat is one element of the black letter law that must be satisfied to successfully utilize the affirmative defense of self-defense in a case where a defendant used deadly force. Thus, a self- defense jury instruction that did not include the duty to retreat, would be incomplete. Betliskey cannot request a jury instruction on self-defense and at the same time complain that the trial court discussed the duty to retreat. Betliskey cannot have and eat the proverbial cake too. As such, we find no merit in this assertion. Accordingly, we overrule the fourth assigned error.

Self-Defense and Ohio's Burden of Proof Unconstitutional

{¶37} In the fifth assigned error, Betliskey argues that placing the burden of proof of self-defense on the defendant is unconstitutional.

{¶38} Betliskey is seeking to have R.C. 2901.05(A), which requires the defendant to bear the burden of proof when raising a self-defense claim, declared unconstitutional. Betliskey recognizes that the United States Supreme Court upheld the constitutionality of R.C. 2901.05(A) in *Martin v. Ohio*, 480 U.S. 228, 233-234, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987). However, Betliskey claims a different result is now warranted in light of the

ruling in *Dist. of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008).

{¶39} Initially, as an inferior court to the United States Supreme Court, we are bound to follow the *Martin* decision and have no authority to overturn it. *Loyed*, 8th Dist. Cuyahoga No.83075, 2004-Ohio-3961 at ¶ 33. Further, this court has previously rejected the argument that *Heller* requires a different result. *State v. Warmus*, 197 Ohio App.3d 383, 2011-Ohio-5827, 967 N.E.2d 1223, ¶ 42-47 (8th Dist.); *State v. Hudson*, 8th Dist. Cuyahoga No. 96986, 2012-Ohio-1345. *See also State v. Geter-Gray*, 9th Dist. Summit No. 25374, 2011-Ohio-1779, ¶ 25-26 (rejecting similar argument).

{¶40} In *Heller*, the court held that the Second Amendment protects an individual's right to possess a firearm in the home for the purpose of self-defense. *Id.* at 635-636. In doing so, the court recognized that self-defense is a "central component"to the right to bear arms. *Id.* at 599. While *Heller* recognizes a right to self-defense, "nothing in *Heller* purports to alter the way the states have defined self-defense." *Warmus* at ¶ 47. Accordingly, for these reasons, we overrule the fifth assigned error.

Considering Defendant's Present and Future Ability to Pay Fine

{¶41} In the sixth assigned error, Betliskey argues that the trial court failed to consider his present and future ability to pay a fine, restitution and court costs.

{¶42} Pursuant to R.C. 2929.19(B)(6), "the court shall consider the offender's present and future ability to pay" before imposing a financial sanction or fine. However, "there are no express factors that must be taken into consideration or findings regarding

the offender's ability to pay that must be made on the record. Moreover, the trial court is not required to hold a hearing in order to comply with R.C. 2929.19(B)(6), although it may choose to do so pursuant to R.C. 2929.18(E)." *State v. Martin*, 140 Ohio App.3d 326, 338, 2000-Ohio-1942, 747 N.E.2d 318 (4th Dist.). Furthermore, "Ohio law does not prohibit a court from imposing a fine on an indigent defendant." *State v. Ramos*, 8th Dist. Cuyahoga No. 92357, 2009-Ohio-3064, ¶ 7.

{¶43} In the instant case, the court ordered Betliskey to pay $3,900 in restitution to Scheussler, Sr., for out of pocket medical expenses, plus $1,500 in fines and court costs. The trial court ordered and reviewed the presentence investigation report before sentencing, and discussed Scheussler, Sr.'s medical bills including the amount not covered by his insurance company, that formed the basis of the restitution order. The trial court did not state anything on the record about Betliskey's present and future ability to pay this amount, but the trial court's sentencing journal entry states that "the court considered all required factors of the law."

{¶44} While it facilitates appellate review when a trial court states that it specifically considered the defendant's ability to pay, we cannot say that the aforementioned references in the record do not meet the low threshold of R.C. 2929.19(B)(6), as a matter of law. In addition, Betliskey hired counsel to represent him at the trial level and testified that he was working full time in the construction trades before this offense. Further, the record reveals that Betliskey had a prior conviction that had not prevented him from being gainfully employed prior to this offense.

{¶45} Consequently, nothing in the record suggests that Betliskey would be prevented from working upon his release from prison. Accordingly, we overrule the sixth assigned error.

Ineffective Assistance of Counsel

{¶46} In the seventh assigned error, Betliskey argues he was denied the effective assistance of counsel.

{¶47} To establish a claim for ineffective assistance of counsel, Betliskey must show that his counsel's performance was deficient and that deficiency prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). Under *Strickland*, our scrutiny of an attorney's work must be highly deferential, and we must indulge "a strong presumption that counsel's conduct falls within the range of reasonable professional assistance." *Id.* at 688.

{¶48} Betliskey argues that his counsel was ineffective for failing to properly object to the trial court's failure to give the requested jury instruction on the lesser included offense of aggravated assault. As discussed at length in the first assigned error, the facts of the instant case did not justify a jury instruction on aggravated assault.

{¶49} Betliskey also argues that counsel was ineffective because he failed to request jury instructions on defense of another. Again, as discussed in the second assigned error, Betliskey was not entitled to instructions on defense of another.

{¶50} In addition, Betliskey argues counsel was ineffective because he failed to object the duty to retreat and at fault jury instructions. As borne out in the third and fourth assigned errors, Betliskey requested and received jury instructions on self-defense. There we pointed out that "duty to retreat" and "at fault" are both elements of the black letter law that must be satisfied to successfully utilize the affirmative defense of self-defense in a case where a defendant used deadly force. Thus, the trial court would have properly overruled counsel's objections.

{¶51} Further, Betliskey argues counsel was ineffective for failing to challenge Ohio's self-defense law that places the burden of proof on defendant. As discussed in the fifth assigned error, we underscored that as an inferior court to the United States Supreme Court, we are bound to follow its decisions and have no authority to overturn its precedent.

{¶52} Finally, Betliskey argues counsel was ineffective for failing to object to the trial court's imposition of the restitution order, fines, and court cost. As discussed in the previous assigned error, nothing in the record suggests that Betliskey would be prevented from working upon his release from prison. As previously discussed, Betliskey hired his own counsel, was working at the time of the offense, and the record indicates that he was able to find employment despite having a prior felony conviction.

{¶53} We conclude that the issues raised within this assigned error with respect to Betliskey's trial counsel's actions constitute matters of trial strategy. Trial strategy and even debatable trial tactics do not establish ineffective assistance of counsel. *State v.*

Rosa, 8th Dist. Cuyahoga No. 96587, 2012-Ohio-1042, citing *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 111.

{¶54} Although Betliskey cites the above instances that he deems counsel should have objected, the Ohio Supreme Court explained in *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, 858 N.E.2d 1144, ¶ 139-140, such tactical decisions do not give rise to a claim for ineffective assistance:

> [F]ailure to object to error, alone, is not enough to sustain a claim of ineffective assistance of counsel. To prevail on such a claim, a defendant must first show that there was a substantial violation of any of defense counsel's essential duties to his client and, second, that he was materially prejudiced by counsel's ineffectiveness. *State v. Holloway* (1988), 38 Ohio St.3d 239, 244, 527 N.E.2d 831. * * *
>
> [Experienced trial counsel learn that objections to each potentially objectionable event could actually act to their party's detriment. * * * In light of this, any single failure to object usually cannot be said to have been error unless the evidence sought is so prejudicial * * * that failure to object essentially defaults the case to the state. Otherwise, defense counsel must so consistently fail to use objections, despite numerous and clear reasons for doing so, that counsel's failure cannot reasonably have been said to have been part of a trial strategy or tactical choice. *Lundgren v. Mitchell* (C.A.6, 2006), 440 F.3d 754, 774. Accord *State v. Campbell* (1994), 69 Ohio St.3d 38, 52-53, 1994-Ohio-492, 630 N.E.2d 339.

{¶55} The record reveals no such failure by Betliskey's trial counsel. Betliskey has not demonstrated that his trial counsel's performance fell below objective standards of reasonable representation or that he was prejudiced as a result. Accordingly, we overrule the seventh assigned error.

Cumulative Errors

{¶56} In the eighth assigned error, Betliskey argues that the cumulative errors deprived him of his right to due process.

{¶57} It is true that separately harmless errors may violate a defendant's right to a fair trial when the errors are considered together. In order to find "cumulative error" present, we first must find that multiple errors were committed at trial. We then must find a reasonable probability that the outcome of the trial would have been different but for the combination of the separately harmless errors. *State v. Clark*, 8th Dist. Cuyahoga No. 89371, 2008-Ohio-1404, ¶ 62, citing *State v. Djuric*, 8th Dist. Cuyahoga No. 87745, 2007-Ohio-413.

{¶58} In the instant case, Betliskey argues that the multiple errors raised in his previously discussed assigned errors form the basis of his cumulative-errors argument. However, based on our discussion in the previous assigned errors, where we found no errors regarding Betliskey's pivotal complaints in this case, we find that the doctrine of cumulative errors is inapplicable. Accordingly, we overrule the eighth assigned error.

{¶59} Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

PATRICIA ANN BLACKMON, JUDGE

LARRY A. JONES, SR., P.J., and
KATHLEEN ANN KEOUGH, J., CONCUR

APPENDIX

Assignments of Error

I. The trial court committed prejudicial error when it failed to give a jury instruction on aggravated assault in violation of the Fifth, Sixth and Fourteenth Amendments of the Federal Constitution.

II. The trial court committed prejudicial error when it failed to give a jury instruction on "defense of another" when it gave the self- defense instructions in violation of Ohio law and the Sixth and Fourteenth Amendments to the Federal Constitution.

III. The "at fault" jury instruction contained in the self-defense jury instruction was unconstitutionally vague in violation of the Sixth and Fourteenth Amendments to the Federal Constitution.

IV. The trial court erred in giving a "duty to retreat" jury instruction in violation of Ohio law and the sixth, Eighth, and Fourteenth Amendments of the Federal Constitution.

V. Ohio unconstitutionally places the burden of proof of self-defense on the defendant in violation of the Second, Fifth, Eighth, and Fourteenth Amendments of the Federal Constitution and Article I, Sections 1, 4 and 10 of the Ohio Constitution.

VI. The trial court committed prejudicial error when it failed to consider Betliskey's present and future ability to pay fine, restitution and court costs in violation of ORC 2929.19(B)(5) and 2929.28(B) in violation of Ohio law.

VII. Defense counsel was ineffective throughout the case under Strickland and the cumulative affect of the ineffectiveness deprived Betliskey of his right to counsel.

VIII. The cumulative errors throughout trial denied appellant due process under the Fourteenth Amendment.