

[Cite as *State v. Kelly*, 2015-Ohio-5272.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102413

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ROBERT A. KELLY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED; REMANDED FOR
CORRECTION

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-586484-A

BEFORE: Celebrezze, A.J., E.A. Gallagher, J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: December 17, 2015

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FRANK D. CELEBREZZE, JR., A.J.:

{¶1} Appellant, Robert Kelly, brings the instant appeal challenging his felonious assault and having a weapon while under disability convictions. He argues the court gave incorrect jury instructions, trial counsel was ineffective, he was deprived of his right to be present at trial, and he was denied a speedy trial. After a thorough review of the record and law, this court affirms his convictions but remands for the issuance of a nunc pro tunc entry to correct the journal entry of sentence.

I. Factual and Procedural History

{¶2} One of the mothers of appellant's children, along with her father, owned a building located at 1194 East 71st Street in Cleveland, Ohio. Appellant had keys to the building and allowed people from the neighborhood to use it as what he described as a community center. The ground floor housed a vacated space that was once a bar. The second floor consisted of an apartment. According to appellant, he lived in the upstairs apartment. However, other witnesses testified the upstairs apartment was used more as a party spot to hang out, play cards and dice, drink, and bring girls.

{¶3} Appellant was acquainted with Pierre Owens because they lived in the same neighborhood and had friends in common. Owens often hung out with appellant's godson, Roderick. Sometime in May 2014, appellant accused Owens of stealing items from the building — specifically a drill. However, according to Owens, on May 21, 2014, the two had a conversation that ended amicably and appellant also stated that there was no animosity between them during that conversation.

{¶4} Owens spent that day hanging out with Roderick and two women. They arrived at the building on East 71st Street sometime after 10:00 p.m., and Roderick received the keys to the building from appellant at some point that evening. Owens left a few hours later to go see a different woman. He spent the night with this woman while Roderick and the two other women stayed the night at the building in the upstairs apartment. At around 5:30 a.m., Owens arrived back at the building and was seated in a car parked in the driveway waiting on one of the women to come down. Appellant briefly talked to Owens and then left. Owens then took the woman he spent the night with to breakfast and then took her home. He returned to the building and got the keys to the building from Roderick, who then left. Owens went upstairs to the apartment where the two women were sleeping.

{¶5} Around 11:00 a.m., appellant walked into the upstairs apartment. Appellant demanded the keys and one of the women indicated Owens had them. According to Owens, he retrieved the keys off the table in the kitchen, removed the key from a key ring and handed the building keys to appellant. Appellant then shot Owens in the leg.

{¶6} Owens ran toward the back of the apartment by a window. Before he could jump out, appellant shot him again. By this time the women in the apartment were screaming and terrified. Appellant ordered them out of the apartment and he escorted them to the door. He then came back to Owens, who was laying on the floor in a back room. Appellant demanded to know who paid Owens money to kill him, and informed

him that there would be no retribution today. During the questioning, appellant struck Owens in the temple with the gun causing a laceration that required several stitches. Appellant also searched through Owens's pockets and took the money he found inside. Appellant then shot Owens again in the foot. Appellant ordered Owens to get up. Owens was dragged to the front of the apartment toward the stairs. When Owens protested that he could not walk down the stairs because of his gunshot wounds, appellant shot him again and Owens fell down the stairs. Appellant then dragged Owens out of the building toward a vacant lot. Owens collapsed on the ground in the vacant lot and appellant shot him in the abdomen. Appellant then fled. A shell casing of the same caliber and manufacturer as those found inside the apartment was recovered from the lot.

{¶7} Owens managed to crawl inside a nearby house. The residents of that house called the police and Owens was transported to the hospital where he spent the next 11 days undergoing multiple surgeries and recuperating. The events of that day resulted in Owens receiving eight to ten gunshot wounds to his shoulder just over his left clavicle, his left and right feet, his right knee, his right thigh, right buttock, and left thigh.

{¶8} Appellant's version of events that day as testified to at trial differ somewhat. Appellant said he went to the building at about 5:30 a.m. on May 22, 2014, and saw appellant seated in a car in the driveway. He talked briefly to Owens and then left. He was afraid Owens was there to kill him because a few days before, Owens had told him there was a contract out for his life and that Owens had accepted it, but would not fulfill it. Appellant stated he went to a friend's house to sleep. At 8:30 a.m.

appellant called a number he looked up online for police headquarters and left a message explaining the situation. He stated he called again about a half-hour later. He waited for a few hours, but did not receive a call back from police. He then headed back to the building around 11:00 a.m. Appellant admitted he was armed at the time. He entered the building and walked up to the apartment. Upon entering, he saw Owens somewhere near the back of the apartment. He asked one of the women where his keys were, and she motioned toward Owens. Owens then motioned toward the dining room table where a set of keys was located along with a handgun. Appellant stated that Owens rushed towards him so he picked up the gun off the table and shot Owens in the leg. Owens then ran toward the back of the house. Appellant followed and shot Owens once more. He then ordered the two women out of the house for their own safety.

{¶9} Appellant admitted to pistol whipping appellant and emptying the magazine of the gun by firing several more shots, striking Owens. Appellant asserts that he did this because appellant rushed him again. Appellant then led Owens to the stairway leading up to the apartment and then kicked him down the stairs when Owens refused to walk forward. Owens was then dragged by appellant out of the apartment.

{¶10} Appellant stated that Owens never had a gun. Appellant also stated that Owens picked up shell casings off the floor in the back bedroom after being shot but before being led from the apartment. Appellant surmised that Owens placed these shell casings outside to make it appear as though Owens was shot outside.

{¶11} Appellant was arrested by police and he gave them a statement where he admitted shooting Owens, but claimed Owens shot him first and he only survived because he was wearing a bullet-proof vest. On June 18, 2014, appellant was indicted and charges included attempted murder, aggravated robbery, felonious assault, robbery, having a weapon while under disability, and various counts included one- and three-year firearm specifications.

{¶12} Prior to trial, appellant made a motion to dismiss based on speedy trial. The court held a hearing on the motion and determined that the time within which appellant must be brought to trial had not run. Appellant made arguments himself that he did not give his attorney any authority to request any continuances nor did he assent to any continuances. Appellant vaguely indicated he wished to fire his counsel, but would not answer the court's questions on the subject. After repeated attempts to ascertain what appellant was actually requesting with no success, the court determined that appellant was not seeking self-representation or to fire counsel.

{¶13} A jury trial began on November 17, 2014. Owens and one of the two women in the building testified for the state, along with police officers, and Owens's treating physician. Appellant testified in his own defense. At the close of trial, the judge granted appellant's Crim.R. 29 motion in part and dismissed the charge of attempted murder with prior calculation and design. The remainder went to the jury for determination.

{¶14} On November 24, 2014, the jury returned verdicts of not guilty to the counts of attempted murder, two counts of aggravated robbery, robbery, and abduction. The jury found appellant guilty of two counts of felonious assault, violations of R.C. 2903.11(A)(1) and (A)(2), and one count of having a weapon while under disability, a violation of R.C. 2923.13(A)(3). The jury also found appellant guilty of the one-and three-year firearm specifications accompanying each count of felonious assault.

{¶15} The trial court proceeded immediately to sentencing. The court found that the two counts of felonious assault merged and the state elected to impose sentence on the second one. The court imposed an eight-year sentence on this count to be served prior and consecutive to a three-year term for the firearm specification. The court also imposed a 24-month sentence for having a weapon while under disability. After making findings justifying consecutive sentences, the court ordered that the prison terms imposed on the two counts be served consecutively for a total of 13 years. The court then informed appellant of postrelease control, waived costs and fines, and appointed appellate counsel.

{¶16} Appellant then filed a timely notice of appeal assigning five errors for review:

I. The trial court's instructions misled the jury into believing that the defendant had a duty to retreat even in his own home, and gave the jury conflicting information that effectively negated the presumption that [appellant] was justified in using deadly force.

II. Defense counsel was ineffective because he failed to request an instruction on an inferior offense that was consistent with the evidence presented, and because he failed to object to prosecutorial misconduct.

III. The trial court improperly deprived [appellant] of his right to be present at his own trial.

IV. The trial court erred by improperly journalizing [appellant's] sentence.

V. The trial court erred by denying [appellant's] motion to dismiss for want of a speedy trial.

II. Law and Analysis

A. Jury Instructions

{¶17} Appellant first argues that the court improperly instructed the jury regarding self defense and the Castle Doctrine.

{¶18} Courts have a duty to properly instruct a jury so the jury may properly weigh the evidence and perform its duty as the factfinder. *State v. Comen*, 50 Ohio St.3d 206, 553 N.E.2d 640 (1990), paragraph two of the syllabus. This includes giving all relevant and necessary instructions. *Id.*

{¶19} Appellant did not properly object to the contents of the instructions in order to preserve this error for our review. He has therefore waived all but plain error. *State v. Adams*, 62 Ohio St.2d 151, 153, 404 N.E.2d 144 (1980). Crim.R. 52(B) provides this court with discretion to review such errors: “Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” However, this court should only exercise that discretion with utmost caution and under exceptional circumstances to relieve a manifest miscarriage of justice. *State v. Long*, 53 Ohio St.2d 91, 93, 372 N.E.2d 804 (1978), at paragraph three of the syllabus. The type

of error complained of here “does not constitute a plain error or defect under Crim.R. 52(B) unless, but for the error, the outcome of the trial clearly would have been otherwise. *Id.* at 97.

i. Castle Doctrine Instruction

{¶20} R.C. 2901.05(B) codifies in Ohio what is commonly known as the “Castle Doctrine.” R.C. 2901.05(B)(1) provides:

[A] person is presumed to have acted in self-defense or defense of another when using defensive force that is intended or likely to cause death or great bodily harm to another 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.

{¶21} This provision, among others, codifies the Castle Doctrine in Ohio and “creates a rebuttable presumption, and the burden to prove the charged individual was not acting in self-defense falls on the state.” *State v. Kozlosky*, 195 Ohio App.3d 343, 2011-Ohio-4814, 959 N.E.2d 1097, ¶ 25 (8th Dist.). This doctrine provides a presumption that people act in self-defense when using defensive force to expel or in attempting to expel a person from their home or automobile. However, the protection of the statute is limited. “The operative word is ‘when.’ Once the ‘person against whom the defensive force is used’ is no longer either on the defendant’s property or a threat, or when the defendant has succeeded in ‘expelling’ the other person, then the privilege under which the defendant operated is over.” *State v. Koehler*, 8th Dist. Cuyahoga No. 100915, 2014-Ohio-3922, ¶ 23.

{¶22} The trial court informed the jury that appellant had the duty to demonstrate his affirmative defenses, which comes directly from R.C. 2901.05(A). The court then properly instructed the jury of the presumption contained in R.C. 2901.05(B)(1).

{¶23} Here the court gave the instructions that applied to this case based on the evidence adduced at trial. The court instructed the jury that a defendant has the burden of establishing an affirmative defense, but also instructed the jury of the presumption of self-defense according to the Castle Doctrine. The jury instructions flowed directly from R.C. 2901.05(A) and (B). They were therefore correct statements of the law. The written jury instructions provided by the court included correct statements of the law on self-defense including the presumption of self-defense when in one's residence when using defensive force. The court gave both a self-defense instruction and a Castle Doctrine instruction because it was not clear by any means which should apply based on the evidence presented at trial.

{¶24} Appellant was not the owner of the building where the shooting occurred. He had no lease or evidence that he resided or had a right to occupy the building. The female witness testified that there was no working restroom in the apartment and pictures taken by police and submitted to the jury demonstrated the deplorable condition of the bathroom. Further, from pictures of the kitchen, the apartment appeared to lack a refrigerator. Other testimony from the female witness and Owens classified the apartment as a party spot that was used by a number of individuals in the neighborhood and that Owens was at the apartment at the time of the shooting at the behest of Roderick;

someone with permission to be at the apartment according to appellant's own testimony. Testimony also established that appellant had a key to the premises, so whether appellant resided at the building and whether Owens was without privilege to be there were certainly disputed at trial.

{¶25} Also, R.C. 2901.05(B) refers to "defensive force." The Castle Doctrine does not provide a license for one to torture another human being. Appellant admitted to shooting appellant and hitting him in the head with the butt of his gun as he lay on the ground and posed no threat. Therefore, there was evidence that the Castle Doctrine would not apply but other evidence existed that would allow for a jury to find that the affirmative defense of self- defense could apply. Based on that, two instructions were given. The conflicting evidence introduced in the case supported both instructions. If the Castle Doctrine did not apply, then appellant indeed had a duty to retreat if he was not in his own residence. That is exactly the manner in which the trial court arranged the instruction. The jury would never reach the issue of a duty to retreat unless it found the Castle Doctrine did not apply.

{¶26} The trial court's instruction on the Castle Doctrine was not a misstatement of the law. The court's further instruction given to the jury about the order of consideration of the two defenses also did not so mislead the jury that it created a manifest miscarriage of justice.

ii. Self-defense Instruction

{¶27} Appellant claims the court erroneously instructed the jury regarding self defense by including a duty to retreat.

{¶28} Appellant correctly points out that the Castle Doctrine does not include a duty to retreat: “For purposes of any section of the Revised Code that sets forth a criminal offense, a person who lawfully is in that person’s residence has no duty to retreat before using force in self-defense, defense of another, or defense of that person’s residence * * *.” R.C. 2901.09(B). However, general self-defense involving use of deadly force does contain such an element:

To establish self-defense, the following elements must be shown: (1) the slayer was not at fault in creating the situation giving rise to the affray, (2) the slayer has 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 such force, and (3) the slayer *must not have violated any duty to retreat or avoid the danger*.

(Emphasis added and citations omitted.) *State v. Melchior*, 56 Ohio St.2d 15, 20, 381 N.E.2d 195 (1978). The trial court included instructions on both a duty to retreat under the general self-defense instruction, and no duty to retreat as set forth in R.C. 2901.09(B) regarding the Castle Doctrine instruction. This is because evidence supported both instructions.

{¶29} Evidence was presented that appellant removed Owens from the building and took him to a nearby vacant lot everyone referred to as a field. The Castle Doctrine is not available to appellant in a vacant lot next to the building he claimed was his home, and R.C. 2901.09(B) would not apply to any gunshot appellant fired at Owens there. Further, there was conflicting testimony whether appellant resided at the building and

whether Owens was lawfully allowed to be there. The court's instruction on self-defense that included a duty to retreat was not improper.

{¶30} The jury instructions given by the trial court do not demonstrate error such that the results of trial would likely have been different. Therefore, appellant's first assignment of error is overruled.

B. Ineffective Assistance of Counsel

{¶31} Appellant claims his attorney was ineffective for failing to properly object to the jury instructions given by the trial court and for failing to request an instruction on the inferior offense of aggravated assault. Appellant also claims counsel failed to object to prosecutorial misconduct.

{¶32} This court reviews alleged instances of ineffective assistance of counsel under the test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Trial attorneys are entitled to a strong presumption that their conduct falls within range of reasonable assistance unless it demonstrated that counsel's conduct fell below an objective standard of reasonableness and the errors were so serious that there is a reasonable probability, but for the errors, the results of trial would have been different. *Id.* at 688; *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraphs two and three of the syllabus. Further, this court may not second-guess decisions of counsel which can be considered matters of trial strategy. *State v. Smith*, 17 Ohio St.3d 98, 477 N.E.2d 1128 (1985). Debatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel, even if in hindsight, it

looks as if a better strategy was available. *State v. Cook*, 65 Ohio St.3d 516, 524, 605 N.E.2d 70 (1992).

i. Failure to Request an Inferior Offense

{¶33} The decision to request an inferior offense is generally within the ambit of trial strategy. In this case, appellant's entire defense was that Owens was a hired assassin who intended to kill him. He acted to defend his own life. An instruction that appellant acted out of provocation and not out of concern for his own life could be seen as incongruous with this asserted defense. *State v. Levonyak*, 7th Dist. Mahoning No. 05 MA 227, 2007-Ohio-5044, ¶ 19. All witnesses who testified indicated Owens did not provoke appellant. Any words exchanged between appellant and Owens were minimal and were only about the whereabouts of appellant's keys. Appellant testified Owens being in the building enraged him, but that is contradicted by appellant's own actions where he was calm enough to shoot appellant in the leg and foot, and to interrogate and beat Owens. Serious provocation has to be reasonably sufficient to bring on extreme stress and "[f]ear alone is insufficient to demonstrate the kind of emotional state necessary to constitute sudden passion or fit of rage." *State v. Mack*, 82 Ohio St.3d 198, 201, 694 N.E.2d 1328 (1998).

{¶34} While seeking instructions for both is permissible, *State v. Garltic*, 8th Dist. Cuyahoga No. 90128, 2008-Ohio-4575, ¶ 22, the facts of this case do not demonstrate that counsel's decision to focus on appellant's fear for his life was outside the bounds of appropriate trial strategy employed by a reasonable attorney.

ii. Failure to Object to Prosecutorial Misconduct

{¶35} Appellant also claims counsel was deficient when he failed to object to questioning from the state about appellant's current incarceration in jail awaiting trial and statements made by the state during closing arguments.

{¶36} First, appellant focuses on the statement made by the prosecutor during closing arguments that only one of the women present in the apartment when the shooting started testified in court. The prosecutor stated, "You didn't hear from one of the females, and you can probably suspect why she would not be willing to come down to court." Appellant claims this remark suggests that appellant may have threatened the witness.

{¶37} Next appellant argues that the state, in its closing argument, improperly vouched for the credibility of Owens and disparaged appellant's testimony. Finally, appellant claims the state improperly characterized appellant as a criminal by drawing the jury's attention to the fact that appellant was currently in jail.

{¶38} These statements and questions, even if improper, do not raise serious questions that the result of trial would have been different had appellant's attorney objected. The jury was apparently not prejudiced enough to find appellant guilty of attempted murder, aggravated robbery, robbery, and abduction. The jury clearly did not believe Owens's testimony of the events of the day he was shot in spite of any improper vouching by the state.

{¶39} As for any improper inference that appellant intimidated a witness, the jury could have also drawn the inference that the nontestifying female witness did not want to contradict the testimony of a person appellant classified as an assassin who had killed a number of people. Therefore, there is no likelihood that an objection to the state's closing argument on this topic would have changed the outcome of trial.

{¶40} Finally, the questioning by the state posed during its cross-examination of appellant regarding his current incarceration was not posed to improperly prejudice the jury. It was in response to appellant's testimony that he had resided in the building where Owens was shot for about six months. The state was pointing out that by the time of trial, appellant had not resided in the building since his arrest on June 11, 2014. Also, during his interview with police and at the time of his arrest, he gave police two different addresses of residence — neither of which was the address of the building. The state was attempting to demonstrate that appellant did not reside in the building and it was attempting to negate any claim that the Castle Doctrine applied. While the state's method of pointing to appellant's incarceration may have been improper, the question certainly did not prejudice the jury in this case where the jury returned not guilty verdicts on the most serious charges. Therefore, this assignment of error is overruled.

C. Removal From the Courtroom for Disruptive Behavior

{¶41} A criminal defendant has a right to be present during all stages of the proceedings from indictment through sentencing, and absence could constitute a denial of due process. *State v. Williams*, 6 Ohio St.3d 281, 286, 452 N.E.2d 1323 (1983).

Appellant claims his removal during the discussion of the jury instructions and jury charge constituted a denial of due process. However, the right to be present can be waived with consent or other extraordinary circumstances, such as misconduct. *Id.* Crim.R. 43 allows a defendant displaying disruptive conduct to be excluded from proceedings. This rule states: “Where a defendant’s conduct in the courtroom is so disruptive that the hearing or trial cannot reasonably be conducted with the defendant’s continued physical presence, the hearing or trial may proceed in the defendant’s absence or by remote contemporaneous video * * *.” Crim.R. 43(B).

{¶42} Throughout this case, appellant disrupted proceedings and showed contempt for the court and the level of decorum demanded by the judge. Appellant defiantly refused to answer questions put to him by the judge, raised objections about the court’s jurisdiction, and shouted things alleging a lack of contract and jurisdiction numerous times throughout trial. The court showed a great deal of patience dealing with appellant’s outbursts. Finally, the court ordered appellant removed from the courtroom and placed in a nearby room where he could observe the proceedings through a video monitor. This was done only on the final day of trial for a discussion of the jury instructions and the jury charge.

{¶43} Nothing in the course of the court’s treatment of appellant leads to the conclusion that the court erred. The trial judge warned appellant numerous times that if he did not control himself he would be removed. The judge offered appellant every chance to regain his composure and conform to the proper standards of conduct the court

required. Appellant continued to disrupt proceedings, defy proper orders from the judge, and refuse to answer the judge's questions. The judge employed the least restrictive means of moving forward with the case where the defendant was purposefully attempting to prevent the proceedings from going forward. Therefore, this assigned error is summarily overruled.

D. Journal Entry of Sentence

{¶44} Appellant argues that the sentencing entry in this case is incorrect in a number of respects. This court remanded the case for correction of the sentencing entry.

On remand, the trial court remedied the entry's incorrect reference to an eight-year sentence on Count 8, a count that did not survive merger with Count 9, and properly imposed sentence on Count 9 as elected by the state. However, the trial court also modified the sentence to include concurrent sentences on Counts 9 and 10. At the original hearing, the court ordered the sentences on these two counts to run consecutively after making the appropriate findings. The total sentence as stated during the hearing was 13 years.

{¶45} On remand from this court for correction of the journal entry of sentence, the court indicated it was imposing an 11-year prison sentence. The nunc pro tunc entry indicated that the two sentences on Counts 9 and 10 were to run concurrently. Therefore, the court's use of a nunc pro tunc was improper in this case because it does not reflect what actually occurred at sentencing.

{¶46} A nunc pro tunc order records acts done at a former time that were not then carried into the record. A nunc pro tunc order may be used to make the record reflect the truth, but not to reflect something that did not occur. *See State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 30. It is therefore vacated and the case is remanded to the trial court for issuance of a nunc pro tunc entry that accurately reflects the sentence imposed by the court at the sentencing hearing.

E. Speedy Trial

{¶47} Appellant finally argues that he was denied his right to a speedy trial where he did not authorize his attorney to request or consent to any continuance. In fact, appellant was adamant on the record that he specifically informed his attorney that he would not agree to any continuance.

{¶48} Whether appellant's statement to his attorney demanding no continuances be sought or granted is effective to bind the attorney is the only question relevant to the speedy trial issue. If those continuances requested by appellant's counsel are effective to toll the speedy trial time, then the state is well within the 90-day time frame to bring appellant to trial provided in R.C. 2945.71.

{¶49} The question has already been answered by the Ohio Supreme Court. *State v. Taylor*, 98 Ohio St.3d 27, 2002-Ohio-7017, 781 N.E.2d 72, ¶ 33. *See also State v. Dennison*, 10th Dist. Franklin No. 12AP-718, 2013-Ohio-5535, ¶ 18, citing *State v. Brime*, 10th Dist. Franklin No. 09AP-491, 2009-Ohio-6572, ¶ 19, and *State v. Kroesen*, 10th Dist. Franklin No. 00AP-48, 2000 Ohio App. LEXIS 5305 (Nov. 16, 2000). In

Taylor, the court held that counsel's requests for continuances were effective to bind a defendant even where the defendant had informed the attorney and the court that he would not assent to such delays. *Id.* at ¶ 33-36.

{¶50} So long as the continuances requested by counsel are reasonable and would not constitute ineffective assistance of counsel, defense counsel may waive a defendant's right to a speedy trial for the duration of those continuances requested. *Kroesen* at * 20. The attempt to disavow any continuances requested by counsel is a form of hybrid representation and is not allowed in Ohio. It is only when a defendant discharges counsel and proceeds pro se that statements such as appellant's that he would not accept any continuances become effective. *Taylor* at ¶ 36.

{¶51} Appellant did not discharge his counsel and attempt to represent himself pro se. The topic did come up during trial, but appellant never answered the judge's questions on the topic, so appellant did not properly assert his right for self representation.

{¶52} Appellant's argument that he should not be bound by the reasonable continuances requested by his counsel are contradicted by long-standing case law directly on point. Therefore, this assigned error is overruled.

III. Conclusion

{¶53} Appellant's right to fair trial was not impinged by the jury instructions used by the court in this case. The instructions were clear and accurate statements of the law. There was not significant chance of confusion between the court's instruction on the

Castle Doctrine defense and self-defense involving the use of deadly force where the jury would only encounter the latter where it found the former did not apply. Defense counsel was also not constitutionally ineffective for failing to seek different instructions including an inferior offense to felonious assault, and in not objecting to certain statements and questions by the state. Appellant's right to a speedy trial was not violated where there is no serious debate that he was brought to trial within the 90-day period and his only argument is that he should not be bound by his attorney's actions. However, the court erred in its sentencing entry memorializing appellant's prison sentence and in the subsequent attempt to correct those errors. Therefore, this court affirms appellant's convictions and sentence, but remands for the issuance of a nunc pro tunc entry properly journalizing the sentence the court imposed on appellant.

{¶54} Judgment affirmed. However, this case is remanded to the trial court for the issuance of a nunc pro tunc entry to correct the journal entry of sentence.

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 correction of the journal entry.

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

FRANK D. CELEBREZZE, JR., ADMINISTRATIVE JUDGE

EILEEN A. GALLAGHER J., and
EILEEN T. GALLAGHER J., CONCUR