

[Cite as *State v. Edgerson*, 2015-Ohio-593.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 101283

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**TERRY EDGERSON**

DEFENDANT-APPELLANT

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**JUDGMENT:**

AFFIRMED IN PART; REVERSED IN PART, AND REMANDED FOR RESENTENCING

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-13-579176-B

**BEFORE:** Stewart, J., Celebrezze, A.J., and McCormack, J.

**RELEASED AND JOURNALIZED:** February 19, 2015

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MELODY J. STEWART, J.:

{¶1} Defendant-appellant, Terry Edgerson, appeals his conviction on two counts of aggravated assault in violation of R.C. 2903.12(A)(1) and 2903.12(A)(2). For the following reasons, we affirm the convictions but reverse and remand for the limited purpose of merging the two offenses.

{¶2} The charges against Edgerson arise out of a physical altercation between Edgerson and the victim that occurred at the apartment of Delise Coleman. The testimony and medical records presented at trial reflect the following.

{¶3} On September 25, 2013, Edgerson and Coleman were eating a meal at Coleman's apartment when they were visited by the victim. The victim, who was a friend of Coleman's and lived in the same apartment complex, stopped by Coleman's apartment to deliver beer that she had asked for earlier in the day. Coleman invited the victim in, and he proceeded to introduce himself to Edgerson by extending his hand for a handshake, but did so over Edgerson's food. When Edgerson refused to shake his hand because he was eating, the victim became agitated and directed verbal insults at Edgerson. Coleman testified that at this point, she asked the victim to leave her apartment. According to the victim, as he waited outside Coleman's apartment for the elevator, Edgerson came at him with a knife. While both the victim and Edgerson dispute who started the fight, it is undisputed that the fight ended with the victim breaking Edgerson's jaw, and the victim being stabbed three times. The victim testified that Edgerson stabbed him with a knife twice in the shoulder, and Coleman stabbed him once in the lower back. The victim also admitted at trial that he had been drinking that evening and medical records confirm that the victim was highly intoxicated.

{¶4} Not knowing who to charge in the affray, the Cuyahoga County prosecutor presented the case to the grand jury. The grand jury returned an indictment charging Edgerson with two counts of aggravated assault. Count 1 of the indictment charged Edgerson with aggravated assault for knowingly causing serious physical harm to another through the use of deadly force, in violation of R.C. 2903.12(A)(1). The second count charged him with aggravated assault for knowingly causing physical harm to another by means of a deadly weapon or dangerous ordnance, to wit, a knife, in violation of R.C. 2903.12(A)(2). The grand jury also returned a true bill against Coleman for allegedly stabbing the victim.<sup>1</sup>

{¶5} The case proceeded to a jury trial. The jury found Edgerson guilty on both counts, as charged. The court sentenced him to concurrent, suspended, 15-month prison terms on each charge, and placed him on two years of probation with conditions attached.

{¶6} On appeal, Edgerson first argues that defense counsel was constitutionally ineffective for failing to request a jury instruction on self-defense. A claim of ineffective assistance of counsel requires the defendant to prove that 1) his counsel's performance fell below an objective standard of reasonableness, and 2) that counsel's deficient performance prejudiced him at trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690. In Ohio, there is a strong presumption that an attorney, properly

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<sup>1</sup> The indictment charged both Edgerson and Coleman as codefendants in the case. The court granted defense counsel's motion for separate trials due to potential *Bruton* issues. *See Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d. 476 (1968) (holding that it is a violation of a defendant's confrontation rights to introduce, at a joint trial, a codefendant's confession naming the defendant as a participant in the crime, because the codefendant cannot be compelled to testify at his or her own trial). However, both defendants later waived their *Bruton* rights when Coleman testified at Edgerson's trial.

licensed, is competent. *State v. Quinones*, 8th Dist. Cuyahoga No. 100928, 2014-Ohio-5544, ¶ 18. Therefore, “decisions on strategy and trial tactics are granted wide latitude of professional judgment, and it is not the duty of a reviewing court to analyze trial counsel’s legal tactics and maneuvers.” *Id.*

{¶7} In this case, defense counsel chose to proceed on the theory that Edgerson did not cause the harmful injury to the victim because he did not have a knife with him when the fight occurred. It is not unreasonable that defense counsel chose not to proceed with asking for a self-defense instruction. The defense of self-defense requires that the defendant prove, by a preponderance of the evidence, (1) that he was not at fault in creating the situation giving rise to the affray; (2) that 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 such force; and (3) that he must not have violated any duty to retreat or avoid danger. *State v. Williford*, 49 Ohio St.3d 247, 249, 551 N.E.2d 1279 (1990). In Ohio, the second element of self-defense is a subjective inquiry. *See State v. Goff*, 128 Ohio St.3d 169, 2010-Ohio-6317, 942 N.E.2d 1075, ¶ 37. Because self-defense is a subjective inquiry, “the defendant’s state of mind is crucial to the defense.” *State v. Koss*, 49 Ohio St.3d 213, 215, 551 N.E.2d 970 (1990).

{¶8} We find that in this case, it would have been very difficult to prove Edgerson’s state of mind at the time of the fight without Edgerson testifying to it. However, Edgerson’s criminal record, which included a murder conviction and a conviction for domestic violence, all but precluded him from taking the witness stand. Therefore, under these circumstances, trial counsel had the choice of proceeding on the theory of self-defense and possibly exposing his client’s criminal record, or asserting another plausible defense, that his client was not the cause of the victim’s injuries. The fact that trial counsel chose the latter option is not ineffective

assistance of counsel. It is trial strategy. We therefore overrule Edgerson's first assignment of error.

{¶9} Edgerson next argues that the court erred by denying counsel's request for a mistrial.

At trial, state's witness, Officer Donald Mollohan, testified that when he interviewed Edgerson, Edgerson stated that he stabbed the victim after the victim assaulted him. The defense asked the court for a mistrial based on the fact that the alleged statement was not included in any of the police reports and not disclosed during discovery. The state agreed that the testimony was likely inaccurate but offered to present the testimony of another officer, Jay Assaf, who was with Mollohan when he interviewed Edgerson, to clear up the inaccurate statement. The trial court denied the motion for a mistrial and gave a curative instruction to the jury telling them to disregard Mollohan's statement about the alleged confession. The court also allowed the state to reopen its case and call Officer Assaf as a witness. Prior to putting Assaf on the stand, the court also informed the jury that Assaf was being called to "clarify any misunderstanding" in regard to what Edgerson said during his interview. Assaf then went on to testify that during the interview he "asked [Edgerson] how [the victim] received stab wounds, and he denied that he ever stabbed him. And during the conversation he said, I never had a knife, but it could have been my keys."

{¶10} A motion for a mistrial should be granted when the ends of justice so require and a fair trial is no longer possible. *State v. Garner*, 74 Ohio St.3d 49, 59, 656 N.E.2d 623 (1995), citing *State v. Franklin*, 62 Ohio St.3d 118, 127, 580 N.E.2d 1 (1991). Trial courts are given broad discretion when deciding whether to grant a mistrial. "As long as 'the record provides sufficient justification for the state-court ruling,' demonstrating that the court did not act 'irrationally or irresponsibly,' \* \* \* but exercised 'sound discretion' the ruling is not

constitutionally defective.” *Ross v. Petro*, 515 F.3d 653, 670 (6th Cir. 2008), quoting *Arizona v. Washington*, 434 U.S. 497, 514, 516–517, 98 S.Ct. 824, 54 L.Ed. 2d 717 (1977).

{¶11} The trial court considered the defense’s motion and chose to offer a curative instruction that informed the jury that it must disregard Mollohan’s testimony regarding Edgerson’s alleged statement about stabbing the victim. The trial court then allowed the prosecution to call Officer Assaf to clear up any lingering misunderstandings about what was said in the interview. Because a jury is generally presumed to follow a trial court’s instructions, *see State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 168, the curative instruction, together with Assaf’s testimony, alleviated the possibility that Edgerson would not receive a fair trial. Therefore, we do not find that the court erred in denying the motion for a mistrial.

{¶12} Edgerson next contends that the jury’s guilty verdicts were against the manifest weight of the evidence presented at trial. An appellate court reviewing a challenge based on manifest weight of the evidence sits as a thirteenth juror to the proceedings. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). As a thirteenth juror,

“the court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of 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.”

*Id.*, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st.Dist 1983). However, a reviewing court may not simply substitute its view for that of the jury, rather reversal on manifest weight grounds “is reserved for the ‘exceptional case in which the evidence weighs heavily against the conviction.’” *State v. Sellers*, 173 Ohio App.3d 60, 2007-Ohio-4681, 877 N.E.2d 387, ¶ 41 (8th Dist.), quoting *Thompkins* at 387.

{¶13} On this point, Edgerson principally argues that the evidence does not support a conviction because the jury was not provided with complete instructions that would permit the jury to consider the applicability of self-defense as an affirmative defense. We take issue with this argument for several reasons.

{¶14} First, Edgerson is attempting to bootstrap the argument that the manifest weight of the evidence did not support his conviction onto the alleged error of failing to provide a jury instruction. This is not the proper way to argue an assignment of error. On a manifest weight challenge, we only look at the evidence presented at trial. We do not look at any alleged errors that might have occurred with regard to jury instructions. The failure to provide a specific jury instruction, when one is warranted, is a conceptually distinct argument from a manifest weight challenge. Furthermore, by presenting his argument in this manner, Edgerson impliedly concedes that the evidence did support his judgment of conviction on the charges. The rationale behind his argument is that he was convicted, not because the evidence did not support a guilty verdict, but because the jury was not able to consider a claim of self-defense.

{¶15} However, even if we were to consider the possibility that this alleged error was properly presented, we would find no error in the court's actions. While an appellate court normally reviews alleged errors in jury instructions for an abuse of discretion, when a defendant does not request a specific jury instruction and fails to object to the jury instructions as given, he waives all but plain error. Plain error is found when defects at trial affect a substantial right. Crim.R. 52(B). To rise to the level of plain error, the alleged error must be an obvious defect that affected the outcome of the trial. *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002).



{¶16} The record reflects that Edgerson never requested a jury instruction on self-defense, and the record is devoid of any objection to the jury instructions as given. Therefore, the plain error standard dictates our review of this matter.

{¶17} No evidence presented at trial suggests that the failure to give a jury instruction on self-defense substantially affected the outcome of trial. To begin, self-defense was never explicitly proffered as a defense at trial and it was hardly even suggested. Defense counsel did not state in his opening, or in his closing, that Edgerson acted in self-defense. Rather, defense counsel's entire theory of the case was that the victim's wounds were self-inflicted and that Edgerson never caused the harmful injury to the victim. Furthermore, self-defense is unlike other defenses in that it is more than a denial or contradiction of the prosecution's evidence of the essential elements of the charged crime. *State v. Poole*, 33 Ohio St.2d 18, 19, 294 N.E.2d 888 (1973). Rather, self-defense is a "justification for admitted conduct." See *State v. Martin*, 21 Ohio St.3d 91, 94, 488 N.E.2d 166 (1986), quoting *Poole* at 19. "[T]his defense admits the facts claimed by the prosecution and then relies on independent facts or circumstances which the defendant claims exempt him from liability." *Id.* at 94. Therefore, in order for Edgerson to have a viable self-defense claim, he must first admit to the elements of the crime charged and then assert his affirmative defense of self-defense.

{¶18} Edgerson never admitted to the elements of the crime of aggravated assault. Further, Edgerson denied harming the victim with a deadly weapon. His defense was simply that he did not have a knife, that he did not know how the victim was injured and that the victim's injuries could possibly have been self-inflicted. Therefore, it is logically and legally inconsistent for Edgerson to deny the charges claimed by the state, principally that he did not cause bodily

harm to the victim, while also asserting that he acted in self-defense. Accordingly, the court committed no error by not giving an instruction on self-defense.

{¶19} We also find that the jury did not clearly lose its way when it found Edgerson guilty on both counts of aggravated assault. While the victim’s account of the fight differs from those of Coleman and Edgerson, the victim told the jury that he was attacked by Edgerson with a knife. The victim testified extensively about the shape, size, and color of the knife involved, and how Edgerson was holding the knife above his head in a “Michael Myers”<sup>2</sup> fashion as he came towards the victim. The jury heard from the state’s witnesses that the victim was the only one involved in the fight who called the police for assistance. And Officer Mollohan, the first responder to the emergency call, testified that when he arrived at the apartment complex, the victim was bleeding from his shoulder and left side. Officer Mollohan testified that while he did not immediately look at the victim’s wounds, the wounds were apparent to him because blood was soaking through the victim’s T-shirt. Although Mollohan testified that no knife was ever found at the scene or on Edgerson, the state called Dr. Joan Papp, the emergency room physician who treated the victim, who testified that the victim’s injuries were consistent with stab wounds. Further the state introduced photographs of the victim’s injuries that showed a gash in his shoulder and two puncture wounds a centimeter wide on his shoulder and lower back.

{¶20} While the defense argues that the victim’s testimony was not credible, we note that in any jury trial, the jury is charged with the responsibility of weighing the evidence and the credibility of the witnesses. Here the defense contends that the victim’s credibility on the witness stand is undermined by the fact that he was highly intoxicated when the fight occurred and was

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<sup>2</sup> We assume this is a reference to the knife-wielding antagonist in the series of *Halloween* feature films.

acting irrationally later on at the hospital. While this may be true, we similarly find that the sole defense witness also had credibility issues for the jury to consider.

{¶21} Coleman was the only defense witness called to testify. While Coleman corroborated Edgerson's police statement, in which Edgerson stated that the victim initiated the fight and that Edgerson never possessed a knife, Coleman was a codefendant in the case. She testified on Edgerson's behalf, despite the fact that charges were pending against her for allegedly stabbing the victim. On cross-examination, the prosecutor made sure the jury knew that Coleman was also facing charges in connection with the fight and that Coleman had an interest in testifying that no knife was involved because such testimony helps her in her own defense.

{¶22} Thus, because the victim so clearly recounted the events of that evening, including providing a description of the weapon and how Edgerson came to attack him, and because the testimony of Coleman was suspect due to her involvement in the case, we cannot say that the jury clearly lost its way when it convicted the appellant.

{¶23} Lastly, Edgerson argues that the court erred when it failed to merge his convictions for aggravated assault. He contends that aggravated assault in violation of R.C. 2903.12(A)(1) and aggravated assault in violation of R.C. 2903.12(A)(2) are allied offenses of similar import that should have merged under R.C. 2941.25, the allied offenses statute. Edgerson argues that the failure to merge the two offenses constitutes a violation of the double jeopardy protections of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 16, of the Ohio Constitution. The state concedes the error.

{¶24} R.C. 2941.25 provides:

(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶25} R.C. 2941.25 requires courts to merge offenses when the offenses are closely related and arise out of the same occurrence. *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶ 43. When determining whether offenses are allied offenses under R.C. 2941.25(A), courts must first decide whether it is possible to commit one offense and commit the other with the same conduct. *Id.* at ¶ 48, citing *Ohio v. Blankenship*, 38 Ohio St.3d 116, 119, 526 N.E.2d 816 (1988). “If the offenses correspond to such a degree that the conduct constituting commission of one offense constitutes commission of the other, then the offenses are of similar import.” *Johnson* at ¶ 48.

{¶26} If the court determines that “multiple offenses can be committed by the same conduct, then the court must determine if the offenses were committed with the same conduct, i.e. ‘a single act, committed with a single state of mind.’ If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.” *Johnson* at ¶ 49, 50 quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 50 (Lanzinger, J., concurring).

{¶27} The Ohio Supreme Court has previously concluded that the offenses of aggravated assault under R.C. 2903.12(A)(1) and 2903.12(A)(2) may be subject to merger because they are the same offense. *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶

37–40 (explaining that “subdivisions (1) and (2) [of aggravated assault] set forth two means of committing the offense — causing serious physical harm to another, or causing or attempting to cause physical harm by means of a deadly weapon or dangerous ordnance. These subdivisions set forth two different forms of the same offense, in each of which the legislature manifested its intent to serve the same interest — preventing physical harm to persons.”). Therefore, the only inquiry we must make is to determine whether the actions did arise out of the same conduct and animus.

{¶28} The injuries that the victim sustained arose out of the fight with Edgerson. There is no evidence from the record that would lead us to conclude that there was a break in Edgerson’s conduct or animus during the course of the fight. Therefore, we find that the offenses of aggravated assault are allied offenses that should have merged in this case.

{¶29} Under Ohio’s merger doctrine, an accused can be tried on both allied offenses, but may be convicted and sentenced on only one. *Maumee v. Geiger*, 45 Ohio St.2d 238, 244, 344 N.E.2d 133 (1976). The prosecution has the choice to pursue one offense over the other. *Id.* Thus, upon remand for merger and resentencing the state must elect which of Edgerson’s aggravated assault charges it would like to proceed on for purposes of sentencing.

{¶30} Conviction affirmed; cause is reversed in part and remanded to the trial court for resentencing consistent with this opinion.

It is ordered that appellant and appellee share 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 resentencing.

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

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MELODY J. STEWART, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and  
TIM McCORMACK, J., CONCUR