

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
	:	
Plaintiff-Appellee,	:	CASE NO. 2014-L-019
	:	
- vs -	:	
	:	
HERBERT E. IMONDI a.k.a.	:	
PAUL HILARE DAIGLE a.k.a.	:	
CARL WOODALL,	:	
	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 13 CR 000135.

Judgment: Reversed and remanded.

Charles E. Coulson, Lake County Prosecutor, and *Teri R. Daniel*, Assistant Prosecutor, Lake County Administration Building, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Charles R. Grieshammer, Lake County Public Defender, and *Vanessa R. Clapp*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} This appeal is from the Lake County Court of Common Pleas. Appellant Herbert E. Imondi appeals his domestic violence conviction. As the jury found Herbert had a prior domestic violence conviction, his conviction is a fourth degree felony. On appeal, Herbert challenges the trial court’s refusal to give a self-defense jury instruction, the trial court’s decision to give a consciousness of guilt for leaving the

scene jury instruction, and argues that his conviction is against the manifest weight of the evidence. For the following reasons, the conviction is reversed and the matter is remanded.

{¶2} The following was presented by the state. On February 5, 2013, Dominic Imondi lived with his mother Christine Imondi and father Herbert Imondi. After school, Dominic submitted a job application and went home. Upon arrival, Herbert was making dinner and his mother Christine was performing chores in the house. Dominic went into the living room to watch TV. His mother eventually joined him. Herbert then entered the room, turned off the TV and said the three of them were going to have a family meeting. The tone of Herbert's voice was irritated and uneasy.

{¶3} Herbert said that he was going to be setting some rules to "make things how they should be." Dominic responded with "OK" and "alright." Herbert sounded loud and irritated. He then said that Dominic will have to come home from school and do chores around the house rather than spending time with his friends. During Herbert's speech, he called Dominic names and made Dominic feel as if Herbert was pushing him away. At one point, Herbert told Dominic to shut his mouth and if he opened it Herbert would send him to the hospital. Dominic responded with "F You." Herbert then concluded the meeting stating that everyone is on their own.

{¶4} During further conversation with Herbert, Dominic suspected that Herbert might kick him out of the house. In response, Dominic asked Herbert where he was going to live. Thereafter, the conversation escalated, and at some point Dominic told Herbert "I'll put you in jail right now." Herbert then threw the phone to Dominic and said "Go ahead." Dominic started to call 911, and Christine tried to stop him. However, Dominic pushed either her body or just her hand away and continued to dial. When

Dominic got through to an operator, Herbert removed his vest and glasses and said “that’s it.” Herbert then charged Dominic and pushed him into the couch. Dominic testified that Herbert was angry and hostile and had a look of “no remorse” with a violent demeanor. In response, Dominic attempted to choke his father with his left arm and bash Herbert’s rib cage with his right arm. Herbert then asked Christine, who had been present during the entire confrontation, “do you see what he is doing to me?”

{¶5} Dominic eventually broke free and tried to go to the dining room to put a table between them. Herbert, went into the kitchen and grabbed knives causing Dominic to run toward the garage to get his shoes. Dominic’s progress toward the garage was impeded by a gate in the entrance of a room in the house. Herbert, who now had a fistful of knives, caught up to Dominic, grabbed his shirts,¹ cut Dominic’s arm, and grabbed Dominic near the neck ripping his shirts in the process. Eventually, Herbert pulled Dominic to the ground and placed him in a headlock and a leglock. Because Dominic believed that he was going to get cut on the neck, Dominic bit Herbert’s arm. While this was happening, Christine started to call the police.

{¶6} Eventually, Christine went to where they were fighting and smacked Herbert in the face causing Herbert to get off of Dominic. Dominic then grabbed a statue off of a shelf and held it over Herbert’s head, who was lying on the ground. Christine asked Dominic not to hurt Herbert. Dominic consequently ran outside with the statue in his hand to ask for help.

{¶7} As Dominic was running down his street, he saw his father leave in a black Volvo travelling in the opposite direction. Christine picked up Dominic in a separate car and took him home. Shortly thereafter the police arrived. Patrolmen

1. Dominic was wearing two shirts.

Richard Smith and Brian Yenkovich ordered Dominic onto the ground. After searching Dominic for weapons, he told the police about the interaction, and the police and Dominic entered the house. Dominic appeared as if he had been crying. When he was standing in the front entry way, Smith noticed a steak knife in the family room and a steak knife and blood spots on the wall next to a vacuum cleaner. When asked about his injuries, Dominic said that he had rib pain and noted a scrape on his arm which would leave a scar.

{¶8} Eventually, Officer Raymond O'Brien arrived at the scene to assist Yenkovich and Smith. While O'Brien was taking Christine's statement, she received a telephone call from Herbert, and she passed the phone to O'Brien. O'Brien testified that Herbert sounded "pissed off." O'Brien informed Herbert that he needed to return to the scene. Herbert replied that he was at the Mentor Police Station and hung up. O'Brien then informed the station to arrest Herbert.

{¶9} Herbert's defense consisted of challenging Christine's and Dominic's credibility, as well as providing his own version of events. According to Herbert, at the family meeting, he told Dominic that he would no longer tolerate Dominic hanging out with people connected to drugs, and that henceforth Dominic would go to church. Moreover Herbert forbid Dominic from slamming the Bible and claiming that he is the antichrist. Dominic responded with "F you" and threatened to throw Herbert in jail. Herbert threw the phone to Dominic and responded "Good Luck. Call them. Try it." While Dominic was dialing the phone, Christine attempted to stop him; however, Dominic pushed her away.

{¶10} Dominic then jumped on the loveseat in the living room and said "this is my castle" and "I am going to throw you in jail." Herbert replied that Dominic better find

some other place to live. In response, Dominic grabbed Herbert by the neck, pulled him down to the ground and started to choke him. Christine then broke the two of them up and Dominic said “I am going to kill you.” Dominic ran into the kitchen and tried to grab two knives; however Herbert got to the knives first. At this point, Christine began dialing 911. Herbert eventually caught up to Dominic, and Dominic grabbed him and pulled him to the ground. Dominic positioned himself on top of Herbert and began punching him while Herbert begged Dominic to stop. Christine then came over and hit Herbert in the face causing his glasses to break. Dominic then got up and grabbed a statue saying “I am going to kill you.” Christine asked Dominic not to harm him. Dominic ran out of the house, and Christine ran to the bedroom causing Herbert to believe that she was going to get the gun. Consequently, Herbert left the scene.

{¶11} Herbert testified that on previous occasions he had witnessed Dominic acting aggressive and violent. Herbert also testified that he was fearful for his life when Dominic put his hands on him.

{¶12} Although, Herbert denied that he caused any physical harm to Dominic, at other times he claimed that he grabbed Dominic’s left arm for “dear life” to prevent Dominic from hitting him with a statue. Herbert also testified that he grabbed Dominic’s shoulder to prevent Dominic from hitting him. The trial court properly instructed the jury that they were free to accept or reject all or part of any witness’s testimony.

{¶13} Nevertheless after Herbert testified, and outside the presence of the jury, the state argued that Herbert was not entitled to a self-defense instruction because he never admitted causing physical harm to Dominic. According to the state, self-defense requires a defendant to acknowledge their actions satisfy the elements of the offense before a defendant is entitled to a jury instruction. The trial court agreed and refused to

give a self-defense instruction. The jury found Herbert guilty and he was sentenced Herbert to 15 months in prison.

{¶14} This appeal followed.

{¶15} As his first assignment of error, Herbert asserts:

{¶16} “The trial court erred when it refused to instruct the jury as to self-defense in violation of the defendant-appellant’s rights to due process and fair trial as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution.”

{¶17} Our standard of review for determining whether the trial court properly refused to give a jury instruction is de novo. *State v. Brown*, 4th Dist. Athens No. 09CA3, 2009-Ohio-5390, ¶34. “Requested jury instructions should be given if they are (1) correct statements of the applicable law, (2) relevant to the facts of the case, and (3) not included in the general charge to the jury.” *State v. Mitchell*, 11th Dist. Lake No. 2001-L-042, 2003-Ohio-190, at ¶10, citing *State v. DeRose*, 11th Dist. Lake No. 2000-L-076, 2002-Ohio-4357, at ¶33, quoting *State v. Edwards*, 11th Dist. Lake No. 2001-L-005, 2002-Ohio-3359, at ¶20. In determining whether a self-defense jury instruction is warranted, we look to “whether the defendant has introduced sufficient evidence, which, if believed, would raise a question in the minds of reasonable men concerning the existence of such issue.” *State v. Melchior*, 56 Ohio St.2d 15 (1978), paragraph one of the syllabus. We evaluate the evidence in a light most favorable to the defense. *State v. Belanger*, 190 Ohio App.3d 377, 2010-Ohio-5407, ¶3 (3rd Dist. 2010) (Citation omitted.).

{¶18} Herbert maintains that that the trial court was required to give a self-defense jury instruction because he produced sufficient evidence indicating that (1) he

was not at fault for creating the situation, (2) he had a bona fide belief he was in imminent danger, (3) he did not violate a duty to retreat, and (4) the force used was necessary. See *State v. Hendrickson*, 4th Dist. Athens No. 08CA12, 2009-Ohio-4416, ¶23 (listing the requirements for a self-defense instruction). The state does not dispute that these requirements were met; rather, they assert that Herbert is not entitled to the instruction because he unequivocally denied using force against Dominic. Therefore, the issue is whether Herbert was entitled to a self-defense instruction in the face of presenting evidence supporting inconsistent defenses, i.e., that Herbert did not harm Dominic, but if he did, then it was in self-defense.

{¶19} The Ohio Supreme Court has conflicting precedents on whether a trial court must give jury instructions when the defendant has requested jury instructions that go to inconsistent defenses. In *State v. Champion*, 109 Ohio St. 281, 286-87 (1924), the Ohio Supreme Court found that the appellant was not entitled a jury instruction for both accident and self-defense, explaining: “If the evidence warrants, the defendant has a right to one request or the other. By no manner of logic, law, or legerdemain is he entitled to both.”

{¶20} Later, in *State v. Martin*, 21 Ohio St.3d 91 (1986), the Ohio Supreme Court considered whether “the state of Ohio may * * * place the burden of proving self-defense on a defendant if the truth of that defense would negate an essential element of the crime charged.” *Id.* at 92-93. In *Martin*, the defense argued that placing the burden on him to demonstrate he acted in self-defense forced him to negate the aggravated murder mens rea, the crime for which he was convicted. *Id.* at 93. The Ohio Supreme Court rejected Martin’s argument holding that self-defense is an

admission to “the facts claimed by the prosecution” that utilizes “independent facts or circumstances which the defendant claims exempt him from liability.” *Id.* at 94.

{¶21} However, in *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, ¶140, the Ohio Supreme Court noted that a lawyer’s decision to present “inconsistent alternative [defense] theories is not per se deficient performance” as “the decision to advance two different theories of non-culpability is a trial tactic or strategy” that is not so unreasonable as to constitute ineffective assistance of counsel.

{¶22} In light of *Mundt*, we cannot read *Champion* and *Martin* as requiring a defendant to admit the state’s case in chief in order to argue self-defense. If arguing inconsistent defenses is a trial tactic that a competent trial attorney would utilize, then the jury should be instructed on the inconsistent defenses. Our conclusion is in agreement with the federal standard, which permits a defendant to argue inconsistent theories before a jury. *See Mathews v. United States*, 485 U.S. 58, 62 (1988) (holding that “even if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment.”). Although *Mathews* concerned whether a defendant was entitled to an entrapment instruction while also contesting the prosecution’s case, other courts have found *Mathews* applicable when a self-defense instruction is requested. *United States v. Goldson*, 954 F.2d 51, 55 (2d Cir. 1991); *United States v. Browner*, 889 F.2d 549, 555 (5th Cir. 1989).

{¶23} Finally, there is no reason to require the defense to admit to the elements of the crime in order to receive a self-defense instruction. Although we have been unable to find a rationale for prohibiting instructions on inconsistent defenses, supporters are concerned with condoning perjury. *See Mathews* 485 U.S. at 65-66

(discussing this issue). However, it is possible to argue inconsistent defenses without a defendant committing perjury. Herbert's testimony that (1) Dominic was not harmed in the altercation, but that even if he were harmed, (2) Herbert acted in self-defense at all times are not inconsistent.

{¶24} Consequently, the first assignment of error has merit.

{¶25} As his second assignment of error, Herbert alleges:

{¶26} "The trial court erred when it instructed the jury on flight in violation of the defendant-appellant's rights to due process and (a) fair trial as guaranteed by the Fifth and Fourteenth amendments to the United States Constitution and Section 10 and 16, Article I of the Ohio Constitution."

{¶27} Within this assignment, Herbert alleges that the trial court erred by giving a flight instruction because the evidence indicates Herbert ran from the scene to the police station. Therefore, Herbert claims that his flight from the scene is not evidence of consciousness of guilt because he never tried to evade the police.

{¶28} The case law cited in the first assignment of error as to whether a jury instruction should be given is applicable here. Furthermore, federal courts look to the strength by which the evidence supports the following four inferences in determining whether a flight instruction should be given: "(1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged." *United States v. Myers*, 550 F.2d 1036, 1049 (5th Cir. 1977).

{¶29} We agree that leaving a volatile situation and going to a police station does not constitute consciousness of guilt as that is simply not the destination of one with a guilty conscious. Accordingly, appellant's second assignment has merit.

{¶30} As his third assignment of error, Herbert alleges:

{¶31} "The trial court erred to the prejudice of the defendant-appellant when it returned a verdict of guilty against the manifest weight of the evidence."

{¶32} Within this assignment, Herbert claims that his conviction is against the manifest weight of the evidence. He does not provide a succinct explanation of how the jury erred; rather, he merely recites his version of events as evidence that Dominic and Christine are incredible witnesses.

{¶33} "[A] manifest weight challenge requires the reviewing court to play the role of a 'thirteenth juror.' *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997 Ohio 52, 678 N.E.2d 541 (1997). A reviewing court should be cognizant of the fact that the jury is in the best position to assess the credibility of the witnesses. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus (1967). For an appellate court to overturn a conviction as being against the manifest weight of the evidence, it must find that '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. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.' *Thompkins*, 78 Ohio St.3d at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 20 Ohio B. 215, 485 N.E.2d 717 (1983)." *State v. Lynch*, 11th Dist. Ashtabula No. 2013-A-0039, 2014-Ohio-1775, ¶21.

{¶34} R.C. 2919.25(A) states: “No person shall knowingly cause or attempt to cause physical harm to a family or household member.” R.C. 2919.25(D)(3) elevates the sentence of a violation of R.C. 2919.25(A) to a fourth degree felony.

{¶35} The jury was free to credit the state’s witnesses over Herbert’s testimony, and his conviction therefore is not against the manifest weight of the evidence.

{¶36} The third assignment of error is without merit.

{¶37} The judgment of the trial court is reversed, and we remand for further proceedings.

CYNTHIA WESTCOTT RICE, J.,

COLLEEN MARY O’TOOLE, J.,

concur.