**[Cite as *State v. Huckabee*, 2004-Ohio-5593.]**

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 83458

STATE OF OHIO

Plaintiff-appellee

vs.

VINCENT HUCKABEE

Defendant-appellant

JOURNAL ENTRY

AND

OPINION

| | |
|---|---|
| DATE OF ANNOUNCEMENT OF DECISION: | OCTOBER 21, 2004 |
| CHARACTER OF PROCEEDING: | Criminal appeal from Common Pleas Court, Case No. CR-430260 |
| JUDGMENT: | REVERSED AND REMANDED. |
| DATE OF JOURNALIZATION: | |
| APPEARANCES: | |
| For plaintiff-appellee: | WILLIAM D. MASON, ESQ.<br>CUYAHOGA COUNTY PROSECUTOR<br>ERIC WEISS, ESQ.<br>Assistant County Prosecutor<br>The Justice Center, 8th Floor<br>1200 Ontario Street<br>Cleveland, Ohio 44113 |
| For defendant-appellant: | GREGORY SCOTT ROBEY<br>MARGARET AMER ROBEY, ESQ.<br>Robey & Robey<br>14402 Granger Road<br>Maple Hts., Ohio 44137 |

KARPINSKI, J.:

**{¶ 1}** Defendant, Vincent Huckabee, appeals his jury trial conviction for aggravated assault. The relevant facts follow. Defendant had helped his girlfriend move into a new home with her children. Although the two were in the process of ending their relationship, he stayed with her on her first night in the new house. He helped her again the next day, as did the victim, who was a man the girlfriend had met at work. The two men had no problems on Saturday. The next day, defendant asked the girlfriend if he could come and get some of his things from the house, but she requested that he wait until the victim left. When defendant checked later, the victim was still at the girlfriend's house, but he went over there anyway. The victim and the girlfriend had each had a couple of cocktails.

**{¶ 2}** Subsequent events are somewhat in dispute, but all parties agree that defendant retrieved his flashlight from the dining room table. A fight then ensued between defendant and the victim in which defendant bit off a piece of the victim's ear in anger. Defendant claimed he acted in self-defense because the victim had him in a headlock and he thought he was choking. The victim and the girlfriend stated that defendant wrestled the victim to the ground and gratuitously bit off a piece of his ear in anger.

**{¶ 3}** Defendant then left the house, called the police from his car, and waited until the police came and arrested him. The victim was taken to the hospital. Efforts to reattach the missing portion of his ear were not successful, and he will require further surgeries to repair it.

**{¶ 4}** Defendant was convicted in a jury trial on the one count indictment, which stated that defendant: "did knowingly cause serious physical harm to [the victim] and/or did knowingly cause or attempt to cause physical harm to [the victim] by means of a deadly weapon or dangerous ordnance, to-wit: flashlight, as defined in Section 2923.11 of the Revised Code."

**{¶ 5}** Defendant states seven assignments of error in his appeal. Assignments III and V are interrelated and will be addressed together first because they are dispositive of the case. They state:

> **III. THE COURT COMMITTED REVERSIBLE ERROR WHEN IT PROVIDED THE JURY WITH AN ERRONEOUS AND MUDDLED CHARGE ON THE LESSER INCLUDED OFFENSE OF ASSAULT.**
>
> **IV. IT WAS A VIOLATION OF DUE PROCESS AND REVERSIBLE ERROR IN THIS CASE TO FAIL TO INCLUDE THE WRITTEN JURY INSTRUCTIONS IN THE FILE FOR USE IN THE APPEAL.**

**{¶ 6}** Defendant alleges that the jury instructions concerning the lesser included offense of assault were "erroneous" and "muddled" and that the trial court's failure to include the written instructions with the file on appeal prejudiced him because their omission prevented this court from reviewing the written charge.

**{¶ 7}** A charge to the jury should state the applicable law in a plain and unambiguous manner. *State v. Sanders* (Oct. 9, 1997), Cuyahoga App. No. 71382, citing *Marshall v. Gibson* (1985), 19 Ohio St.3d 10, 12. If an error is assigned concerning a jury instruction, the reviewing court cannot take one portion of the instruction in isolation and review it without viewing it in the context of the entire jury charge. *State v. Price* (1979), 60 Ohio St. 2d 136, paragraph four of the syllabus. *Sanders*, citing *State v. Hardy* (1971), 28 Ohio St.2d 89.

**{¶ 8}** Further,

**{¶ 9} [w]here in instructing the jury the court stated a correct rule or principle of law and also stated a prejudicially incorrect rule or principle of law with reference to the same subject matter, no presumption arises that the correct rule was applied by the jury in the consideration of the issue presented, and the error in giving the incorrect**

**rule will be deemed prejudicial. (Paragraph five of the syllabus in the case of *Bosjnak v. Superior Sheet Steel Co.*, 145 Ohio St., 538, approved and followed.**)

**{¶ 10}** *Westropp v. Scripps Co.* (1947), 148 Ohio St. 365, paragraph six of the syllabus. See also *State v. Slagle* (June 14, 1990), Cuyahoga App. No. 55759; *City of Mount Vernon v. Kline* (Dec. 9, 1991), Knox App. No. 91-CA-06.

**{¶ 11}** The jury instruction contained in the trial transcript on felonious assault[1] states:

**{¶ 12} The defendant, Mr. Huckabee, is charged with felonious assault, in violation of Revised Code Section 2903.11, in Count One of the indictment. Before you**

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[1] R.C. 2903.11 defines felonious assault:

> (A) No person shall knowingly do either of the following:
> (1) Cause serious physical harm to another or to another's unborn;
> (2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.

R.C. 2903.12 defines aggravated assault:

> (A) No person, **while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim** that is reasonably sufficient to incite the person into using deadly force, shall knowingly:
>
> (1) Cause serious physical harm to another ***;
>
> (2) Cause or attempt to cause physical harm to another *** by means of a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code.

It defines assault, R.C. 2903.13:

> (A) No person shall knowingly cause or attempt to cause physical harm to another ***.
>
> (B) No person shall recklessly cause serious physical harm to another or to another's unborn.
>
> (C) Whoever violates this section is guilty of assault. Except as otherwise provided in division (C) (1), (2), (3), (4), or (5) of this section, assault is a misdemeanor of the first degree.

Emphasis added.

**can find the defendant guilty, you must find beyond a reasonable doubt that on or about the third day of November, 2002, in Cuyahoga County, Ohio, the defendant, Vincent Huckabee, did knowingly cause or attempt to cause serious physical harm to [the victim] by means of a deadly weapon or ordnance, to wit: a flashlight, as defined in Section 2923.11 of the Revised Code.**

**{¶ 13} If you find that the State has failed to prove beyond a**

**{¶ 14} reasonable doubt that the defendant knowingly caused serious physical harm to [the victim], then you must find the defendant not guilty of felonious assault.**

**{¶ 15} If you find that the State proved beyond a reasonable doubt that the defendant knowingly caused serious physical harm to [the victim], and find that the defendant failed to prove by a greater weight of the evidence that he acted while he was under the influence of sudden passion or a sudden fit of rage, either of which was brought on by serious provocation occasioned by the victim that was reasonably sufficient to incite the defendant into using deadly force, then you must find the defendant guilty of felonious assault.**

**{¶ 16} If you find that the State proved beyond a reasonable doubt that the defendant knowingly caused serious physical harm to [the victim], but you also find that the defendant proved by a greater weight of the evidence that he acted while under the influence of sudden passion or in a sudden fit of rage, either of which was brought on by serious provocation occasioned by the victim that was reasonably sufficient to incite the defendant into using deadly force, then you must find the defendant guilty of aggravated assault.**

**{¶ 17} However, if you find that the State failed to prove beyond a reasonable doubt all of the essential elements of aggravated assault, then your verdict must be not guilty of that offense; and in that event, you will continue your deliberations to decide whether the State has proved beyond a reasonable doubt all the essential elements of the lesser included offense of assault.**

**{¶ 18} *****

**{¶ 19} The offense of aggravated assault is distinguished from assault by the absence or failure to prove sudden passion or fit of sudden rage and that the defendant acted recklessly.**

**{¶ 20} *****

**{¶ 21} If you find that the State proved beyond a reasonable doubt all the essential elements of the offense of felonious assault or aggravated assault and that the defendant failed to prove by a preponderance of the evidence the defense of self-defense, your verdict must be guilty. (Emphasis added.)**

**{¶ 22}** In its instructions, the court gave an implicitly contradictory statement of law concerning who had the burden of proving provocation or the absence of provocation in aggravated assault. Within one page, the court shifted the burden of proving provocation from the defendant to the state.[2] First, the court told the jury that, if it found "that the **defendant proved** by a greater weight of the evidence that he acted under the sudden influence of passion or in a sudden fit of rage, either of which was brought on by serious provocation occasioned by the victim," emphasis added, it must find there was aggravated assault. In the next paragraph, however, the court tells the jury: "If you find that **the State failed** to prove beyond a reasonable doubt **all of the essential elements of aggravated assault**, then your verdict must be not guilty of that offense ***." Tr. at 355. Emphasis added. Provocation is an essential element of aggravated assault. *Deem*, supra at 211.

**{¶ 23}** Also significant is the confusion surrounding the court's instruction concerning the lesser included offense of assault if the jury did not find defendant guilty of felonious assault. The court stated, at the end of its instruction on felonious assault,

> **{¶ 24} [i]f you find the defendant not guilty of felonious assault or are unable to agree on a verdict of either guilty or not guilty of felonious assault as charged in Count One of the indictment, then you will continue your deliberation to decide whether the State has probed [sic] beyond a reasonable doubt all the essential elements of the lesser included offense of assault**.

**{¶ 25}** Instead of proceeding to define assault, the court instructed the jury on the elements of aggravated assault as follows:

> 1) **For purposes of this case, the offense of aggravated assault is distinguished from felonious assault by the presence of sudden passion or sudden fit of rage on the part of the defendant brought on by serious provocation occasioned by the victim**.

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[2]Defendant has the burden of proof of provocation. *State v. Deem* (1988), 40 Ohio St.3d 205, 211.

**{¶ 26}** Not until five pages later did the court define assault, after it told the jury that, if it found that the state had failed to prove the elements of aggravated assault, it should continue its "deliberations to decide whether the State has proved beyond a reasonable doubt all the essential elements of the lesser included offense of assault." Tr. at 355.

**{¶ 27}** While other portions of the instruction make it clear that the jury must first make a finding of felonious assault before it can make a finding or aggravated assault, its misplaced discussion of aggravated assault was enough to cause confusion as to the logical sequence the jury was to follow.

**{¶ 28}** It is clear that the jury was confused by the instructions as they were given by the court. The jury sent two notes to the court requesting clarification. The first note stated:

**{¶ 29}** We have (3) verdict sheets

1) **Felonious assault**
2) **Aggravated assault**
3) **Assault**
4) **Is aggravated assault a subset of felonious assault.**
5) **If we agree that it is felonious assault then do we have to agree whether it is aggravated or not.**
6) **Or are they three separate mutually exclusive charges, with only one having to be completed**.

**{¶ 30}** The nature of these questions indicates that the jury was confused by the flaws in the instructions. The court responded by writing back, "Please refer to the jury instructions for answers to these questions."

**{¶ 31}** At almost the same time, the jury sent another note to the court. The court addressed both notes at the same time on the record. The second note stated:

1) **We need a definition of the decision tree.**
2) **Do we need to first decide if guilty of felonious assault & then if yes is it aggravated or non-aggravated.**
3) **Don't quite understand.**
4) **Is weapon necessary for felonious assault**.

**{¶ 32}** The court responded again by stating, "please refer to the jury instructions for answers to these questions."

**{¶ 33}** The jury finally found defendant not guilty of felonious assault and not guilty of assault, but did find him guilty of aggravated assault.

**{¶ 34}** As defendant's fifth assignment of error notes, we do not have the written copy of the jury instructions before us as required by R.C. 2945.10(G).[3] It is impossible for us to determine, therefore, whether the written instructions stated the correct law. Clearly, the oral instructions given to the jury were erroneous in so far as they said that the state had to prove all elements of aggravated assault, which includes provocation, and, at the very least, were confusing, as evidenced by the jury's questions.

**{¶ 35}** The failure to include written instructions with the record has been shown to be harmless error in many circumstances, *State v. Scott* (June 14, 1994), Franklin App. 93APA12-1752; *State v. Mills* (Dec. 9, 1999), Cuyahoga App. No. 74700. If the written instructions are needed to resolve an issue raised in the appellate court, however, their omission is not harmless. In another case in which the jury instructions were at issue, this court held that "[t]he lack of inclusion into the record of this case of the written jury instructions has compromised appellant's right to due process

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[3] The pertinent portion of that statute reads:

> The court, after the argument is concluded and before proceeding with other business, shall forthwith charge the jury. Such charge shall be reduced to writing by the court if either party requests it before the argument to the jury is commenced. Such charge, or other charge or instruction provided for in this section, when so written and given, shall not be orally qualified, modified, or explained to the jury by the court. Written charges and instructions shall be taken by the jury in their retirement and returned with their verdict into court and remain on file with the papers of the case.

of law; therefore, it must be deemed harmful error. State v. Smith, supra; State v. Melton, 2000 Ohio App. LEXIS 1922 (May 4, 2000), Cuyahoga App. No. 75792, unreported." *State v. Johnson* (July 12, 2001), Cuyahoga App. No. 78327, 2001 Ohio App. LEXIS 3099, at *16. See also *Columbus v. Marcum* (1989), 65 Ohio App.3d 530, 534-535.

**{¶ 36}** Because we do not have a copy of the written jury instructions as required by law, and because the instructions orally presented were erroneous and the jury was demonstrably confused by them, we cannot know whether the jury made its finding by applying the correct law or even that it had the correct law before it in the jury room. Accordingly, the case is reversed and remanded for a new trial.[4]

**{¶ 37}** This cause is reversed and remanded.

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[4] The remaining assignments of error, which are mooted by our decision on these two assignments of error, state:

> I. DEFENDANT WAS DENIED HIS DUE PROCESS RIGHT TO A UNANIMOUS VERDICT AND HIS CONSTITUTIONAL RIGHT TO BE INFORMED OF THE NATURE OF THE ACCUSATION AGAINST HIM WHEN THE GOVERNMENT PROSECUTED HIM UNDER AN INDICTMENT CHARGING TWO SEPARATE NON-ALLIED OFFENSES IN ONE COUNT JOINED BY "AND/OR," AND THE JURY WAS CHARGED IN THE SAME WAY.
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> II. THE COURT ERRED WHEN IT OVERRULED THE DEFENSE OBJECTION TO THE ORDER AND LACK OF CLARITY OF THE JURY INSTRUCTIONS, THUS NEEDLESSLY CONFUSING THE JURY AND DEPRIVING THE DEFENDANT OF A FAIR TRIAL.
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> IV. THE DEFENDANT IS ENTITLED TO A NEW TRIAL ON THE GROUNDS THAT THE VERDICT OF GUILTY OF AGGRAVATED ASSAULT AND NOT GUILTY OF THE LESSER INCLUDED OFFENSE OF ASSAULT - IN THE SAME COUNT - ARE INCONSISTENT.
>
> VI. THE COURT DENIED THE DEFENDANT HIS RIGHT TO DUE PROCESS AND HIS RIGHT TO CONFRONT THE WITNESSES AGAINST HIM WHEN IT DID NOT ALLOW DEFENDANT TO CROSS-EXAMINE OFFICER MAXWELL ON MATTERS WITHIN HIS AREA OF EXPERTISE.
>
> VII. THE JURY'S DECISION FINDING THE DEFENDANT GUILTY OF AGGRAVATED ASSAULT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

It is, therefore, ordered that appellant recover of appellee his costs herein taxed.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

ANNE L. KILBANE, P.J., AND

FRANK D. CELEBREZZE, JR., J., CONCUR.

DIANE KARPINSKI
JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).