

[Cite as *State v. Parr*, 2016-Ohio-5629.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103894

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

SABRINA PARR

DEFENDANT-APPELLANT

JUDGMENT:
VACATED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-15-595654-A

BEFORE: Laster Mays, J., E.A. Gallagher, P.J., and Kilbane, J.

RELEASED AND JOURNALIZED: September 1, 2016

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ANITA LASTER MAYS, J.:

{¶1} Defendant-appellant, Sabrina Parr (“Parr”), appeals her guilty verdict and sentence and asks this court to reverse her conviction and remand the matter to the trial court for a new trial on the merits. We vacate the conviction and remand to the trial court for a new trial.

{¶2} Parr was found guilty of two counts of felonious assault, a second-degree felony, in violation of R.C. 2903.11(A)(1) and (2) and one count of domestic violence, a first-degree misdemeanor, in violation of R.C. 2913.25(A). The trial court sentenced Parr to serve three years of probation, with six months of incarceration. Parr was released early from jail.

I. Facts

{¶3} On May 7, 2015, Parr arrived home from a basketball playoff game, and her husband, Antonio Davis (“Davis”), was laying on the bed. Parr tossed her purse onto the bed next to Davis, and went into the bathroom. Two phones fell out of her purse onto the bed next to Davis. Davis, who was unaware of the second phone, began reading text messages that led him to believe that Parr was having an affair. According to Davis, upon finding the text messages, he decided to leave the home. As he was walking towards the door, Davis testified that Parr charged at him using foul language. Parr scratched, punched, and pulled Davis. Davis continued to try and leave the home. Parr grabbed a trophy and hit Davis in the back of head causing him to bleed. Davis

asked Parr to take him to the hospital. Instead, Parr threw his keys over the garage into the woods, got into her car, and drove away. Davis called 911 because he was injured and could not get back into the locked home, where his children were sleeping.

{¶4} After Davis contacted emergency services, the police located Parr and conducted a traffic stop. Parr was driving towards downtown to meet her friend for dinner. The officers asked Parr if she was just involved in an altercation, and Parr stated that she had an argument with her husband, but left the home to avoid a confrontation. At this time, the officers were informed that Davis had sustained significant physical injuries and observed that Parr had none. In his testimony, Officer Hanish (“Hanish”), the arresting officer, testified that he determined her to be the primary physical aggressor and arrested her.

{¶5} During this time, Davis was transported to the hospital where he received seven staples in the back of his head, and prescribed medication. The doctor who cared for Davis’s injuries testified that the injury Davis sustained was significant and caused by a considerable amount of blunt force.

{¶6} As a result of the altercation, Parr was indicted by the Grand Jury on May 29, 2015 and was charged with two counts of felonious assault and one count of domestic violence. During the trial, Hanish testified as to what he witnessed the night he arrested Parr. Hanish described Parr’s calm demeanor, lack of physical injuries, and neat appearance.

{¶7} Hanish testified that as he conducted the traffic stop, he received a call on his radio from another officer about Davis's injuries to the back of his head. Hanish stated,

At that time I reapproached [sic] the driver of the vehicle and requested she step out of the vehicle and step to the rear so that I could speak with her. She then came around to the rear of the vehicle, and at that time I could not see any physical injuries or anything like that that were noticeable, nor did she complain of anything or even state anything had happened other than just the simple fact that she had gotten into an argument with her husband and left prior, you know, to avoid confrontation. So this is at the point where I determined her to be the primary physical aggressor in the disturbance that we had — were originally responding to. And I request her to please turn around, and that when I placed her under arrest and advised her of being under arrest for the domestic violence. (Tr. 445 and 446.)

Hanish continued with his testimony and stated,

When we respond to something like this, you don't take sides. You have to take all the evidence that you have and facts that you do have and try to make the best determination that you can with what is given in front of you. (Tr. 446.)

{¶8} At the end of trial, before jury deliberations, the trial court gave the following jury instructions to the jury:

If you find that the state proved beyond a reasonable doubt all of the essential elements of the offense of felonious assault as charged in Count 1 of the indictment, and you further find that the defendant proved by a preponderance of the evidence all of the essential elements of the affirmative defense of self-defense, your verdict must be not guilty. (Tr. 867.)

And here is the lesser included offense. It's called aggravated assault, in violation of 2903.12. If you find that the state failed to prove beyond a reasonable doubt all of the essential elements of felonious assault in Count 1 then your verdict must be not guilty of that offense. In that event, or if you are unable to unanimously agree, 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 aggravated assault.

(Tr. 868.)

{¶9} The jury found Parr guilty of all three charges, and the trial court sentenced her to serve three years of probation, with six months of local jail time. Parr was let out of jail early and remains on probation. She assigns three errors for our review:

I. Sabrina Parr was denied her right to trial by jury and to present a complete defense by the trial court's erroneous jury instruction on aggravated assault.

II. The trial court committed reversible error and violated appellant's Fourteenth Amendment right to a fair trial when it improperly permitted a police officer to offer an opinion regarding the defendant's guilt.

III. Appellant was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United State Constitution and Article I, Section 10 of the Ohio Constitution.

We will address the first assignment of error only, because it is dispositive of the case.

II. Jury Instructions

A. Standard of Review

{¶10} Where a defendant does not object to the jury instructions as given, she must demonstrate that plain error occurred. *State v. Dowell*, 8th Dist. Cuyahoga No. 83575, 2004-Ohio-3870, ¶ 31. "An erroneous jury instruction does not amount to plain error unless, but for the error, the result of the trial clearly would have been different." *Id.* "An appellate court must view a trial court's jury instructions in the context of the overall charge rather than in isolation." *Id.* at ¶ 32. "When a court gives a misleading or conflicting instruction(s), we are unable to indulge in that presumption and must reverse, even when applying the jury instructions in their entirety analysis." *State v. Mays*, 161

Ohio App.3d 175, 2005-Ohio-2609, 829 N.E.2d 773, ¶ 37 (8th Dist.), citing *State v. Thompson*, 4th Dist. Ross No. 92CA1906, 1993 Ohio App. LEXIS 5377, at *12-13 (Nov. 9, 1993).

B. Law and Analysis

{¶11} In her first assignment of error, Parr argues that she was denied her right to trial by jury and to present a complete defense by the trial court's erroneous jury instruction on aggravated assault. The prosecution conceded the fact that the jury instruction was erroneous. The trial court stated that aggravated assault is a lesser included offense of felonious assault.

The court's instruction was erroneous. Aggravated assault is not a lesser included offense of felonious assault. Rather, it is an inferior degree of felonious assault. As the Ohio Supreme Court explained, inferior degrees of an offense differ from lesser included offenses. They are, the court said, separate and distinct from the group of lesser included offenses also provided for in the statute and rule.

Id. at ¶ 29.

{¶12} Felonious assault is defined in R.C. 2903.11 as follows: (A) No person 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 R.C. 2923.11; (B) Whoever violates this section is guilty of felonious assault, an aggravated felony of the second-degree.

{¶13} Aggravated assault is defined in R.C. 2903.12 as follows: (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 R.C. 2923.11; (B) Whoever violates this section is guilty of aggravated assault, a felony of the fourth-degree.

{¶14} “As statutorily defined, the offense of aggravated assault is an inferior degree of felonious assault since its elements are identical to those of felonious assault, except for the additional mitigating element of serious provocation.” *State v. Ruppert*, 187 Ohio App.3d 192, 2010-Ohio-1574, 931 N.E.2d 627, ¶ 25 (8th Dist.).

This court recognized that aggravated assault (R.C. 2903.12) is not a lesser included offense of felonious assault (R.C. 2903.11) but is the same offense as felonious assault with a reduction in penalty upon a determination by the trier of fact of the existence of the mitigating circumstance of sudden passion or sudden fit of rage, which mitigates a defendant’s criminal culpability. *State v. Carter*, 23 Ohio App.3d 27, 491 N.E.2d 709 (1985), paragraph one of the syllabus. Therefore, we held that a trial court errs if it instructs a jury that they should consider the charge of felonious assault first and only consider the charge of aggravated assault if they find the defendant not guilty of felonious assault. *Id.* We further explained that a finding of guilty of felonious assault should not end deliberations if there is evidence in the case tending to show the existence of provocation of the defendant. *Id.* at 32.

Id. at ¶ 26.

{¶15} The trial court incorrectly instructed the jury that if they find Parr not guilty of felonious assault, then they have to consider Parr’s guilt for aggravated assault.

In *State v. Nichols*, 11th Dist. Lake No. 2005-L-017, 2007-Ohio- 5219, the trial court defined aggravated assault in the jury instructions as a lesser-included offense of felonious assault and instructed the jury that it could only find the defendant guilty of aggravated assault if it found him not guilty of felonious assault. The court found that the erroneous jury instruction amounted to plain error.

Id. at ¶ 32.

{¶16} Therefore, we find that the trial court's jury instruction amounted to plain error. We vacate Parr's conviction and remand to the lower court for a new trial.

{¶17} Judgment is vacated and remanded to the trial court for proceedings consistent with this opinion.

It is ordered that the appellant recover from appellee 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.

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

ANITA LASTER MAYS, JUDGE

EILEEN A. GALLAGHER, P.J., and
MARY EILEEN KILBANE, J., CONCUR