

[Cite as *State v. Robinson*, 2011-Ohio-189.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94429

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MARVIN ROBINSON

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-527479

BEFORE: Blackmon, J., Rocco, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: January 20, 2011

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PATRICIA A. BLACKMON, J.:

{¶ 1} Defendant-appellant Marvin Robinson (“Robinson”) appeals his conviction for aggravated assault. Finding no merit to the appeal, we affirm.

{¶ 2} In 2009, Lolita Cooks (“Cooks”), who used to date Robinson, was at her apartment with her new boyfriend, Jeff Zizka (“Zizka”). Robinson came over uninvited and began to argue with Cooks and Zizka. At one point Robinson told Zizka to leave. Robinson then walked over to where Zizka was sitting, said “I’m going to f*** you up,” and punched him multiple times in the face. Zizka lost consciousness. He was later taken to the hospital by ambulance and treated for a broken nose.

{¶ 3} Robinson was charged with aggravated burglary, kidnapping, felonious assault, and disrupting public service. The matter proceeded to a trial by jury. Robinson testified in his own defense, stating that Zizka hit him first and he only hit Zizka in order to avoid further injury.

{¶ 4} Defense counsel requested the jury consider the crime of aggravated assault, a lesser included offense of felonious assault. Counsel also asked for a self-defense instruction. Prior to charging the jury, the trial court discussed the jury instructions in detail with both parties. At this time, defense counsel requested the trial court to remove any reference to the duty to retreat or to “deadly force.”

{¶ 5} The jury convicted Robinson of aggravated assault and acquitted him of all other charges. The trial court sentenced Robinson to eighteen months in prison.

{¶ 6} Robinson now appeals, raising one assignment of error for our review.

{¶ 7} In his sole assignment of error, Robinson argues that the trial court erred in instructing the jury that he could not act in self-defense unless he reasonably believed he was in danger of great bodily harm.

{¶ 8} First, we note that Robinson failed to object to the trial court's instruction; therefore, he has waived all errors except plain error regarding the instructions. Crim.R. 52(B). Plain error as to jury instructions is proven when the outcome of the trial would have been different but for the alleged error. *State v. Campbell*, 69 Ohio St.3d 38, 1994-Ohio-492, 630 N.E.2d 339.

{¶ 9} In this case, Robinson requested the trial court delete the portion of the self-defense instruction that referred to deadly force and the duty to retreat. The trial court agreed to do so. But during the recitation of the jury instructions the trial court stated:

{¶ 10} "If, in the careful and proper use of his faculties, the defendant honestly believed and had reasonable ground to believe that an assailant was not able and did not intend to do him *great* bodily harm, then the defendant having notice of his adversary's position was released from the danger and right to use force in self-defense ended." (Emphasis added.)

{¶ 11} It is Robinson's contention that the addition of the word "great" to the instruction deprived him of a fair trial, because it did not allow the jury to consider self-defense if the jury believed that Robinson thought he was in fear of mere "bodily harm."

{¶ 12} Robinson cites our decision in *State v. Durham*, Cuyahoga App. No. 87391, 2006-Ohio-5015, to support his position. In *Durham*, we found plain error when the trial court required the defendant to prove that he believed he was about to be killed or suffer great bodily harm in order to defend himself against the complaining witness. *Id.* Instead, the court should have instructed the jury that before responding with reasonable force, the defendant was required to prove only that he had reasonable grounds to believe he was in imminent danger of bodily harm. *Id.* Since the trial court gave the wrong instruction and in light of the fact that the question of defendant's guilt turned on which version of events the jury believed, the defendant's or the victim's, we concluded that it could not be said that the outcome of the trial was not substantially affected by the trial court's erroneous self-defense instruction. *Id.* at ¶59.

{¶ 13} In this case, unlike *Durham*, the trial court agreed to give the instruction as amended by defense counsel. In *Durham*, the trial court gave the entirely wrong instruction. While the trial court in the instant case did state "great bodily harm" in reading the jury instructions, we note that the court only misspoke a singular time. The trial court correctly used the term "bodily harm" three other times when reading the definition of self-defense to the jury. Moreover, we do not know whether the written jury instructions that the jury received for deliberations included the term "great bodily harm" or just "bodily harm" under the definition of self-defense as the jury instructions were not made part of the trial court record.

We do not find that Robinson can demonstrate prejudice from a single misstatement of the term “bodily harm” in this case.

{¶ 14} Therefore, we cannot say that the trial court committed plain error in instructing the jury in this case. The sole assignment of error is overruled.

{¶ 15} Accordingly, judgment is affirmed.

It is ordered that appellee recover of 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 execution of sentence.

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

PATRICIA A. BLACKMON, JUDGE

KENNETH A. ROCCO, P.J., and
MARY J. BOYLE, J., CONCUR