[Cite as *State v. Murray*, 2019-Ohio-5459.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

BRIAN MURRAY,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 18 MA 0031

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 16-CR-973

BEFORE:
Carol Ann Robb, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:
Affirmed.

Atty. Paul J. Gains, Mahoning County Prosecutor*, Atty. Ralph M. Rivera,* Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee and

Atty. Louis M. DeFabio, 4822 Market Street, Suite 220, Youngstown, Ohio 44512 for Defendant-Appellant.

Dated: December 30, 2019

Robb, J.

{¶1} Defendant-Appellant Brian Murray appeals from his conviction in Mahoning County Common Pleas Court of felonious assault. Four arguments are presented in this appeal. First, Appellant contends the trial court erred in permitting the state's rebuttal witness when the witness was not disclosed prior to trial. Second, Appellant contends the "words alone" jury instruction was improper. Third, he asserts trial counsel was ineffective for failing to request a jury instruction on aggravated assault, an inferior degree offense of felonious assault. Lastly, he argues the conviction for felonious assault is against the manifest weight of the evidence. For the reasons expressed below, the conviction for felonious assault is affirmed.

Statement of the Facts

{¶2} On July 14, 2016, at the Home Depot in Boardman, Ohio, Appellant hit Gabriel Matthews multiple times in the head with a closed fist causing a skull fracture and bilateral subdural hematoma, intracranial bleeding, and frontal subarachnoid hemorrhage. Tr. 190. This resulted in Appellant being charged with R.C. 2903.11(A)(1)(D), felonious assault, a second-degree felony. 9/22/16 Indictment.

{¶3} The case proceeded through discovery and trial. At trial, Appellant testified and asserted self-defense. The state called an undisclosed rebuttal witness, David Asher. Appellant objected and primarily argued the witness was presenting improper character evidence. The trial court overruled the objection and allowed the witness to testify.

{¶4} The jury found Appellant guilty of felonious assault. Appellant was sentenced to seven years in prison. Appellant timely appealed from his conviction.

First Assignment of Error

"The trial court erred in permitting testimony from the State's rebuttal witness as said witness and the nature of his testimony had not been disclosed to Appellant prior to trial and his testimony constituted improper evidence as to Appellant's credibility."

{¶5} This assignment of error concerns the testimony of David Asher, the state's rebuttal witness. In short, Appellant testified at trial he was afraid for his life and that is why he punched Gabriel Matthews repeatedly. David Asher testified on rebuttal that sometime in Spring 2016, Appellant told him he was not afraid of Gabriel Matthews.

{¶6} Two arguments are presented under this assignment of error. Appellant contends the state failed to provide notice of David Asher as a witness pursuant to Crim.R. 16. The second argument is that David Asher's testimony is improper character testimony.

{¶7} The state counters arguing Crim.R. 16 was not violated and even if it was the trial court did not abuse its discretion in allowing the witness to testify because Appellant was provided adequate time to examine the witness prior to him testifying. Furthermore, the state asserts the arguments at trial concerning the rebuttal witness primarily focused on whether his testimony would amount to improper character evidence, not a violation of Crim.R. 16. As to whether the evidence was improper character evidence, the state asserts the testimony refuted Appellant's statement that he was afraid and accordingly, was proper rebuttal testimony.

{¶8} The admission of evidence is within the discretion of the trial court and the court's decision will only be reversed upon a showing of abuse of discretion; a trial court enjoys broad discretion when determining the admissibility of evidence. *State v. Barnes,* 94 Ohio St.3d 21, 23, 759 N.E.2d 1240 (2002); *State ex rel. Sartini v. Yost*, 96 Ohio St.3d 37, 2002-Ohio-3317, 770 N.E.2d 584, ¶ 21. "The term 'abuse of discretion' * * * implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). "[W]hen applying this standard, an appellate court is not free to substitute its judgment for that of the trial judge." *Berk v. Matthews*, 53 Ohio St.3d 161, 169, 559 N.E.2d 1301 (1990). With that standard in mind, we will now address Appellant's arguments.

1. Crim.R. 16(I)

{¶9} The state is correct that Appellant did not clearly raise a Crim.R. 16 argument at trial as a reason for excluding David Asher's testimony; instead, Appellant's arguments were based primarily upon Evid.R. 404 and improper character testimony. Tr. 320-323, 325-326. There was no mention of Crim.R. 16. However, Appellant's counsel

did state, "the state was well aware of what he could testify to and had that knowledge and failed to present that knowledge to me until last night." Tr. 323. Potentially this is sufficient to assert a failure to disclose Crim.R. 16(I) argument.

{¶10} Crim.R. 16(I) reads, in its relevant part: "Each party shall provide to opposing counsel a written witness list, including names and addresses of any witness it intends to call in its case-in-chief, or reasonably anticipates calling in rebuttal or surrebuttal." Crim.R. 16(I).

{¶11} "The criterion for determining whether the state should have provided the name of a witness called for rebuttal is whether the state reasonably should have anticipated that it was likely to call the witness, whether during its case in chief or in rebuttal." *State v. Lorraine*, 66 Ohio St.3d 414, 423, 613 N.E.2d 212 (1993). A prosecutor does not have "a duty to provide the names of witnesses that he reasonably did not anticipate would testify until testimony was presented by appellant which was then properly rebutted." *Id*. If a party fails to comply with Crim.R. 16, the trial court may order the noncomplying party to permit discovery or inspection, grant a continuance, prohibit the party from introducing in evidence the material not disclosed, or any other order that is just under the circumstances. Crim.R. 16(L)(1); *State v. Ross*, 2018-Ohio-3027, 118 N.E.3d 371, ¶ 28 (10th Dist.).

{¶12} Given the above, Crim.R. 16 places a burden on the state to disclose the name of witnesses it **reasonably anticipates** calling in rebuttal. However, a failure to disclose does not necessarily mean the trial court abuses its discretion when it permits the witness to testify.

{¶13} In the appellate brief, the state argued it did not reasonably anticipate calling David Asher until Appellant testified.

{¶14} Appellant's testimony asserted self-defense. Appellant testified that in October, about nine months prior to this incident, Gabriel Matthews threatened him and told him he would burn his house down and kick his "ass." Tr. 285. Appellant then kept his distance from the victim. Tr. 287. According to Appellant when Gabriel Matthews approached Appellant in Home Depot in July 2016, he had his hands up in a confrontational manner and said, "What's up now." Tr. 282. Appellant testified he hit

Gabriel Matthews at the Home Depot in July 2016 because he feared for his life. Tr. 287, 294, 299.

{¶15} David Asher testified that he saw Appellant at a laundromat in Spring 2016. Tr. 337. Asher stated that Appellant told him Gabriel Matthews owed Appellant money and if Matthews did not pay Appellant, Appellant would "beat him [Matthews] down." Tr. 337-338. Appellant told Asher he was not scared of Gabriel Matthews. Tr. 338.

{¶16} The record in this case indicates Appellant's counsel had the opportunity to interview Asher the night before he testified. Tr. 320-323. The record indicates counsel knew exactly what Asher's testimony would be. Tr. 320-323.

{¶17} The state's assertion that it did not reasonably anticipate the need to call David Asher until Appellant testified may be valid. A defendant asserting self-defense is not required to notify the state of the intention to assert that defense. This is different from an alibi defense which specifically requires the state to be notified. Crim.R. 12.1. That said, it seems suspect that the state implies it was not aware of the assertion of self-defense. The state probably should have erred on the side of caution and disclosed Asher's name during discovery. However, that does not mean the trial court abused its discretion in allowing the testimony. As stated above, Appellant's counsel clearly had the opportunity to interview Asher and knew the content of his testimony before he testified. This was a sufficient remedy to neutralize any harm, if there was a violation of Crim.R. 16(I). Furthermore, a Crim.R. 16(I) argument was not clearly asserted. Therefore, it is difficult to conclude, based on Crim.R. 16(I) that the trial court abused its discretion in allowing Asher to testify.

{¶18} For those reasons, any argument that a Crim.R. 16(I) violation warrants reversal fails. The trial court did not abuse its discretion in allowing David Asher to testify.

2. Character evidence

{¶19} As stated above, the primary argument asserted by Appellant at trial for the exclusion of Asher's testimony was Evid.R. 404 improper character evidence. Appellant reasserts that argument and also asserts the testimony was not proper rebuttal testimony.

{¶20} David Asher's testimony was brief and consisted of informing the jury that Appellant said Gabriel Matthews owed him money, if he did not get his money he was

going to "beat him [Gabriel Matthews] down," and Appellant was not afraid of Gabriel Matthews.

{¶21} That testimony is not character testimony and does not violate Evid.R. 404. Character evidence is defined as evidence of a pertinent trait of a persons' character and is not admissible for the purpose of proving that a person acted in conformity with that trait on a particular occasion. Evid.R. 404(A); *Sibert v. City of Columbus*, 10th Dist. Franklin No. 91AP-522, 1992 WL 41253 (Feb. 27, 1992). Black's Law Dictionary defines character evidence as "evidence regarding someone's general personality traits or propensities, of a praiseworthy or blameworthy nature; evidence of a person's moral standing in a community." Black's Law Dictionary (11th ed. 2019).

{¶22} David Asher's testimony did not include any statement about Appellant's personality traits and whether Appellant acted in conformity with those traits. For instance, David Asher did not testify that Appellant is known to be a violent man or he was known to be a dishonest man. Rather, David Asher merely testified to what Appellant told him. Thus, the testimony does not qualify as character evidence.

{¶23} Furthermore, the testimony was proper rebuttal witness testimony. "The purpose of a rebuttal witness is to 'explain, refute or disprove new facts introduced into evidence by the adverse party.'" *State v. Dubose*, 1st Dist. Hamilton No. C–070397, 2008–Ohio–4983, ¶ 69, quoting *State v. McNeill*, 83 Ohio St.3d 438, 446, 700 N.E.2d 596 (1998). "The testimony of a rebuttal witness is only relevant to challenge the evidence introduced by the opponent, and the scope of this testimony is limited to such evidence." *State v. Adkins*, 4th Dist. Gallia No. 03CA27, 2004–Ohio–3627, ¶ 11, citing *McNeill* at 446.

{¶24} David Asher's testimony indicated Appellant was not afraid of Gabriel Matthews. This evidence directly contradicted Appellant's assertion that he was afraid of Gabriel Matthews. Admittedly, Asher's testimony did include a statement that Gabriel Matthews owed Appellant money and Appellant was going to "beat him down" if he was not paid. This statement may have gone to the reason why there was a dispute between Appellant and the victim in October 2015. However, that was not clarified at trial. That testimony did not necessarily challenge what was introduced by Appellant that the two had a disagreement in October 2015 and the victim threatened Appellant. However, it

does, in conjunction with the statement that Appellant was not afraid of the victim, refute Appellant's assertion he was afraid.

{¶25} For those reasons, Appellant's character evidence argument is meritless.

3. Conclusion

{¶26} Both arguments, Crim.R. 16(I) and improper character evidence, are meritless. The trial court's decision to allow Asher to testify on rebuttal was not an abuse of discretion.

Second Assignment of Error

"The trial court committed reversible error when it failed to properly instruct the jury during its deliberations."

{¶27} Two arguments are presented under this assignment of error. Both assert the jury instruction was not proper. The first argument concerns the "words alone" instruction. The second argument concerns trial counsel's failure to request an instruction on aggravated assault, an inferior degree offense to felonious assault. Each argument will be addressed in turn.

1. Words Alone Instruction

{¶28} Appellant first asserts that there is a discrepancy with whether the trial court in instructing on "words alone" used the phrase "deadly force." The transcript indicates the trial court did not use the phrase "deadly force," rather it used the word "force." The instruction given was: "Words alone do not justify the use of force. Resort to such force is not justified by abusive language, verbal threats or other words no matter how provocative." Tr. 376.

{¶29} Appellant asserts this instruction is confusing when it is taken in conjunction with the self-defense instruction and a "words alone" instruction should not be used when the force is not deadly force. The state counters asserting the instruction is a proper statement of the law.

{¶30} Trial courts are required to give the jury all instructions which are "relevant and necessary for the jury to weigh the evidence and discharge its duty as the fact finder." *State v. Comen*, 50 Ohio St.3d 206, 553 N.E.2d 640 (1990), paragraph two of the syllabus. When reviewing the trial court's jury instructions, we must view the instructions in their totality; portions of the instruction should not be viewed in isolation. *State v.*

Levonyak, 7th Dist. Mahoning No. 05 MA 227, 2007–Ohio–5044, ¶ 53; *State v. Gomez*, 12th Dist. Butler No. CA2012-07-129, 2013-Ohio-2856, ¶ 7. We review a trial court's decision to give or not give jury instructions for an abuse of discretion under the particular facts and circumstances of the case; jury instructions are matters left to the sound discretion of the trial court. *Gomez*; *State v. Calise*, 9th Dist. Summit No. 26027, 2012-Ohio-4797, ¶ 68. An abuse of discretion can only be found if the court's attitude is unreasonable, arbitrary or unconscionable. *Adams*, 62 Ohio St.2d at 157.

{¶31} Typically "words alone" instructions are used in conjunction with deadly force. For instance, the Ohio Supreme Court in *State v. Shane* discussed reasonable provocation in a case in which a murder victim told her fiancé that she no longer loved him and that she had been unfaithful. *State v. Shane*, 63 Ohio St.3d 630, 590 N.E.2d 272 (1992). The court stated that "words alone will not constitute reasonably sufficient provocation to incite the use of deadly force in most situations." *Id*. at paragraph two of the syllabus.

{¶32} Appellate courts have extended that type of instruction to assault. The First Appellate District indicated that an instruction stating that the use of a deadly weapon is not permitted in response to mere words, and that vile or abusive language or verbal threats, no matter how provocative, do not justify an assault or the use of a deadly weapon is a correct statement of the law. *State v. Napier*, 105 Ohio App.3d 713, 723, 664 N.E.2d 1330 (1st Dist.1995), citing *Bucyrus v. Fawley*, 50 Ohio App.3d 25, 552 N.E.2d 676 (3d Dist.1988). Although not addressing a jury instruction on "words alone," in a felonious assault case, the Sixth Appellate District when considering whether an aggravated assault instruction should have been given cited the Ohio Supreme Court's *Shane* decision and stated that words alone "will not constitute sufficient provocation to incite the use of force in most situations." *State v. Teal*, 2017-Ohio-7202, 95 N.E.3d 1095, ¶ 53 (6th Dist.). In *Teal,* the felonious assault stemmed from the perpetrator punching, kicking, and biting the victim. *Id*.

{¶33} Considering the law, the "words alone" instruction was not improper. The "words alone" case law supports a decision why an aggravated assault instruction would not be warranted; however, it was not improper in this situation. Furthermore, there is no

dispute that the self-defense instruction was correct. The self-defense and "words alone" instruction given were:

> Now, the defendant claims to have acted in self-defense. To establish a claim of self-defense the defendant must prove by the greater weight of the evidence that he was not at fault in creating the situation giving rise to the incident at Home Depot and he had reasonable grounds to believe, and he was in imminent or immediate danger of bodily harm.
>
> Words alone do not justify force. Resort to such force is not justified by abusive language, verbal threats or other words no matter how provocative.

Tr. 375.

{¶34} When reading the self-defense instruction and the "words alone" instruction together it is not confusing what is required for self-defense.

{¶35} The arguments regarding the "words alone" instruction lacks merit.

2. Aggravated Assault Instruction

{¶36} Trial counsel requested an instruction on self-defense, however he did not request an instruction on aggravated assault. Appellant asserts trial counsel was ineffective for failing to request an instruction on aggravated assault, which Appellant states is a lesser included offense of felonious assault. The states disagrees and argues the evidence does not support an instruction on aggravated assault.

{¶37} We review a claim of ineffective assistance of counsel under a two-part test which requires the defendant to demonstrate: (1) trial counsel's performance fell below an objective standard of reasonable representation; and (2) prejudice arose from the deficient performance. *State v. Bradley*, 42 Ohio St.3d 136, 141–143, 538 N.E.2d 373 (1989), citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). Both prongs must be established; if the performance was not deficient, then there is no need to review for prejudice and vice versa. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000).

{¶38} In evaluating the alleged deficiency in performance, our review is highly deferential to counsel's decisions as there is a strong presumption counsel's conduct fell within the wide range of reasonable professional assistance. *Bradley*, 42 Ohio St.3d at

142–143, citing *Strickland*, 466 U.S. at 689. We are to refrain from second-guessing the strategic decisions of trial counsel. *State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995).

{¶39} To show prejudice, a defendant must prove his lawyer's deficiency was so serious that there is a reasonable probability the result of the proceeding would have been different. *Id*.

{¶40} Aggravated assault is defined as:

> (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 or to another's unborn;

R.C. 2903.12.

{¶41} Appellant was charged with felonious assault in violation of R.C. 2903.11(A)(1), which is defined as "No person shall knowingly * * * cause serious physical harm to another."

{¶42} Aggravated assault is not a lesser included offense of felonious assault. Rather, it is an inferior degree offense. *State v. Deem*, 40 Ohio St.3d 205, 210, 533 N.E.2d 294 (1988) (Aggravated assault is an inferior degree offense of felonious assault because it contains identical elements to those defining felonious assault, except for the additional mitigating element of serious provocation.); *State v. Conley*, 2015-Ohio-2553, 43 N.E.3d 775, ¶ 32 (2d Dist.). Regardless, an instruction on aggravated assault would be warranted if the defendant presents sufficient evidence of serious provocation. *State v. Carter*, 2018-Ohio-3671, 119 N.E.3d 896, ¶ 61 (8th Dist.), citing *Deem.*

{¶43} However, a trial counsel's failure to request instructions on lesser included offenses is often a matter of trial strategy and does not per se establish ineffective assistance of counsel. *State v. Griffie*, 74 Ohio St.3d 332, 658 N.E.2d 764 (1996); *State v. Jackson*, 6th Dist. Sandusky No. S-15-020, 2016-Ohio-3278, ¶ 20 ("In Ohio, there is a presumption that the failure to request an instruction on a lesser-included offense constitutes a matter of trial strategy."). Recently, we have explained:

> Defense counsel's decision to forego an instruction on lesser included offenses, and instead seek an acquittal rather than inviting conviction on a lesser offense, can constitute trial strategy. Debatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel, even if, in hindsight, it looks as if a better strategy had been available. *State v. Cook*, 65 Ohio St.3d 516, 524, 605 N.E.2d 70 (1992).

State v. Henderson, 7th Dist. Mahoning No. 15 MA 0137, 2018-Ohio-2816, ¶ 71.

{¶44} Appellant has not pointed to anything in the record to overcome the presumption of trial strategy. Furthermore, we note that some appellate courts have held that a self-defense instruction is inconsistent with a serious provocation theory. *State v. Andrews*, 8th Dist. Cuyahoga No. 93104, 2010-Ohio-3864, ¶ 31; *State v. Shepherd*, 2017-Ohio-328, 81 N.E.3d 1011, ¶ 26 (12th Dist.) ("In most cases, an aggravated assault instruction is incompatible with an instruction on self-defense, so that both cannot be given together."), citing *State v. Owens*, 5th Dist. Richland No. 2004-CA-87, 2005-Ohio-4402, ¶ 31, citing *State v. Beaver*, 119 Ohio App.3d 385, 397, 695 N.E.2d 332 (11th Dist.1997).

{¶45} Even if there was no presumption of trial strategy, there was not sufficient evidence presented of serious provocation to warrant an instruction on aggravated assault. An instruction on an inferior degree or lesser included offense is only required when the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction on the lesser-included offense. *State v. Wine*, 140 Ohio St.3d 409, 2014-Ohio-3948, 18 N.E.3d 1207, ¶ 34. An instruction on a lesser-included offense is not warranted every time "some evidence" is presented to support the lesser offense. *Shane*, 63 Ohio St.3d at 632; *State v. Grube*, 2013-Ohio-692, 987 N.E.2d 287, ¶ 74 (4th Dist.).

{¶46} Here, there was not sufficient evidence of serious provocation, which is required for the offense of aggravated assault. Appellant testified he was afraid for his life; he did not testify the victim provoked him. Evidence showing a defendant acted out of fear in a situation does not constitute serious provocation necessary for a jury instruction on aggravated assault. *State v. Mack*, 82 Ohio St.3d 198, 201, 694 N.E.2d 1328 (1998) (Fear alone is insufficient to demonstrate the kind of emotional state

necessary to constitute sudden passion or fit of rage); *Owens*, 2005-Ohio-4402 at ¶ 36 (seeking aggravated assault instruction). *See State v. Lindsey*, 10th Dist. No. 14AP-751, 2015-Ohio-2169, ¶ 58 (requesting voluntary manslaughter instruction, which also requires serious provocation).

{¶47} For the above stated reasons, trial counsel was not ineffective for failing to request an instruction on the inferior degree offense of aggravated assault.

3. Conclusion

{¶48} The jury instruction, as given, was correct. This assignment of error lacks merit.

Third Assignment of Error

"The jury's verdict of Guilty as to the Felonious Assault charge was against the manifest weight of the evidence."

{¶49} Appellant asserts he presented more believable evidence than the state did and it is obvious the jury lost its way when it rejected his claim of self-defense. The state asserts the manifest weight of the evidence supports the conviction for felonious assault.

{¶50} When a defendant claims the conviction is contrary to the manifest weight of the evidence, the appellate court is to review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 220, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other." *Thompkins* at 387. It depends on the effect of the evidence in inducing belief, but is not a question of mathematics. *Id.* A conviction will only be reversed as against the manifest weight of the evidence in exceptional circumstances. *Id.*

{¶51} Weight to be given the evidence and the credibility of the witnesses are primarily issues for the trier of the facts. *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 118. A reviewing court will normally defer to the credibility determinations of the trial court because the trier of fact is in a position to personally view

the demeanor, voice inflections and gestures of the witnesses. *State v. Hill,* 75 Ohio St.3d 195, 204, 661 N.E.2d 1068 (1996); *State v. DeHass,* 10 Ohio St.2d 230, 231, 227 N.E.2d 212 (1967). Furthermore, when there are two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, we do not choose which one we believe is more credible. *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999).

{¶52} Appellant was charged with and convicted of felonious assault. As stated above, felonious assault is defined as knowingly causing serious physical harm to another. R.C. 2903.11(A)(1). Appellant does not dispute that he hit the victim and that the victim sustained serious injuries. Appellant contends he acted in self-defense and that the evidence overwhelmingly supports that conclusion.

{¶53} Self-defense is an affirmative defense that a defendant must prove by a preponderance of the evidence. R.C. 2901.05(A); *State v. Goff*, 128 Ohio St.3d 169, 2010-Ohio-6317, 942 N.E.2d 1075, ¶ 36. Affirmative defenses "'do not seek to negate any elements of the offense which the State is required to prove' but rather they 'admit[ ] the facts claimed by the prosecution and then rel[y] on independent facts or circumstances which the defendant claims exempt him from liability.'" *State v. Smith*, 3d Dist. Logan No. 8-12-05, 2013-Ohio-746, ¶ 32, quoting *State v. Martin*, 21 Ohio St.3d 91, 94, 488 N.E.2d 166 (1986).

{¶54} The elements of self-defense differ depending on whether the defendant used deadly or non-deadly force to defend himself. *State v. Stevenson*, 10th Dist. Franklin No. 17AP-512, 2018-Ohio-5140, ¶ 33. We have stated that the elements of self-defense where the defendant is alleged to have used non-deadly force are: (1) he was not at fault in creating the situation giving rise to the affray, and (2) the defendant (even if mistaken) had a bona fide belief (which means a belief that was both objectively reasonable and subjectively honest) that he was in imminent danger of any bodily harm (whether it be deadly or non-deadly)." *State v. Morris,* 7th Dist. Monroe No. 03 MO 12, 2004–Ohio–6810, ¶ 22. Furthermore, we have indicated that the defendant must prove the force he used in defense was commensurate with the threatened danger before he

can claim self-defense in a non-deadly force case. *Struthers v. Williams,* 7th Dist. Mahoning No. 07 MA 55, 2008–Ohio–6637, ¶ 17.[1]

{¶55} At trial, Appellant testified that he was at Home Depot on July 14, 2016 with a coworker, Brian Hobard. Tr. 280. Appellant stated that the victim, Gabriel Matthews, approached him from behind, placed his hand on Appellant's shoulder and spun him around, and said "What's up now." Tr. 282. Appellant testified that he and the victim had gotten into an argument in October 2015 and during that argument the victim threatened to burn Appellant's house down and kick his "ass." Tr. 285. Appellant stated that when the victim approached him in Home Depot in that manner he thought about their argument from October and became afraid for his life and that is why he hit Matthews. Tr. 286-287. On cross-examination, Appellant admitted he did not report the threat. Tr. 290. He also admitted that after the victim was on the ground, he left the scene because he feared for his life. Tr. 299. However, he also stated that once the victim was on the ground, the victim was no longer a threat. Tr. 299.

{¶56} Appellant's friend Leslie Love testified at trial and confirmed that the victim threatened Appellant in October 2015. Tr. 303-304. She indicated there was mutual yelling back and forth between the victim and Appellant during the October 2015 argument. Tr. 305.

{¶57} Allen Poindexter, a friend of Appellant's who witnessed the altercation in Home Depot, avowed that the victim grabbed Appellant by the shoulder and said "Now what." Tr. 311. He stated the victim's tone was aggressive and the victim did throw a punch at Appellant. Tr. 311, 316.

{¶58} Two Home Depot employees who witnessed the altercation between the victim and Appellant testified at trial. Both indicated they did not see who started the altercation, but they did observe Appellant hitting the victim and did not see the victim hit Appellant. Tr. 163, 171-172. The fight began in the store and ended outside the store

[1] Other appellate districts have added a third element that the force used was not likely to cause death or great bodily harm. *State v. Gaston,* 8th Dist. Cuyahoga No. 98904, 2013-Ohio-2331, ¶ 15; *State v. Hoopingarner,* 5th Dist. Tuscarawas No. 2010AP 07 00022, 2010-Ohio-6490, ¶ 31; *State v. Russell*, 12th Dist. Warren Nos. CA2011-06-058 and CA2011-09-097, 2012-Ohio-1127, ¶ 33; *State v. D.H.*, 169 Ohio App.3d 798, 809, 2006-Ohio-6953 (10th Dist.). This third element is equivalent to our statement that the force used in defense must be commensurate with the threatened danger.

with the victim laying on the ground seizing. Tr. 163-164, 172-173. They described the fight as one sided. Tr. 163, 172.

{¶59} Lee Otagah, who accompanied the victim to Home Depot, also testified. He stated he did not see how the altercation started but he noticed Appellant being very aggressive towards the victim and saw Appellant hitting and pushing the victim. Tr. 230.

{¶60} The victim, Gabriel Matthews, testified that he approached Appellant in the store and stuck out his hand to shake Appellant's hand. Tr. 213. Appellant then hit him and Matthews does not remember anything else until waking up in the hospital. Tr. 213-214. Matthews acknowledged that he and Appellant had a falling out in October 2015 and he had not spoken to him since. Tr. 219. Matthews testified that he never threatened Appellant in October 2015. Tr. 219.

{¶61} Surveillance video from Home Depot was played for the jury. Tr. 158. One video is from inside the store and the other video is from outside the store. The video from inside the store shows the victim and his friend walking through the store. About five seconds after they exit the frame, the victim and Appellant come into view. The victim is walking/running backwards and sideways with his arms in a defensive position, while Appellant is walking/running forwards hitting the victim. The victim does not throw a punch in this video. This video also does not show how the altercation started, i.e., it does not show if the victim just put out his hand to shake Appellant's hand or if the victim swung Appellant around and acted aggressively.

{¶62} Pictures of the victim were introduced into evidence. One picture is of the victim's hands. The officer who took the picture testified that the pictures were taken to determine if the fight was a mutual fight. Tr. 244. The pictures show whether the victim's knuckles or hands had any defensive or offensive wounds that he may have sustained. Tr. 244. The picture of the hands does not show any abrasions on the victim's hands. State's Exhibit 8.

{¶63} As previously stated, the state did call a rebuttal witness, David Asher. Asher testified that sometime in Spring 2016 he saw Appellant at a laundromat and Appellant told Asher that Gabriel Matthews owed Appellant money and if Matthews did not pay Appellant, Appellant was going to "beat him down." Tr. 337-338. Asher also testified that Appellant indicated he was not scared of the victim. Tr. 338.

{¶64} Appellant, on rebuttal, denied having that conversation with Asher. Tr. 344.

{¶65} Considering this evidence, we cannot find that the jury clearly lost its way when it rejected Appellant's claim of self-defense. While there was testimony that Gabriel Matthews was aggressive and did hit Appellant, there was evidence that the altercation was one sided. Two employees who did not know either party stated they only saw Appellant hitting Matthews. Furthermore, the picture of Matthews' hands does not show any marks on his knuckles or hands. The video of what occurred in the store shows Appellant hitting Matthews and Matthews retreating; Matthews does punch or swing at Appellant in the video. Although the video does not show how the altercation began, from the video it is clear that it started within a few seconds of Matthews approaching Appellant. Considering the evidence, whether Appellant acted in self-defense when he repeatedly punched Matthews was a question of fact for the jury to decide. The jury could have found Appellant's force was excessive and that Appellant did not prove that he acted in self-defense. Consequently, we are unable to conclude that the jury lost its way in rejecting Appellant's claim that he acted in self-defense. This assignment of error is meritless.

Conclusion

{¶66} All three assignments of error are meritless. Appellant's conviction for felonious assault is affirmed.

Donofrio, J., concurs.

Waite, P.J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.