

ORIGINAL

IN THE SUPREME COURT OF OHIO

10-2196

STATE OF OHIO,
Appellee

On Appeal from the
Highland County Court of Appeals,
Fourth Appellate District

vs.

IVA J. BROWNING
Appellant

Court of Appeals
Case No. 09 CA 036

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT IVA J. BROWNING

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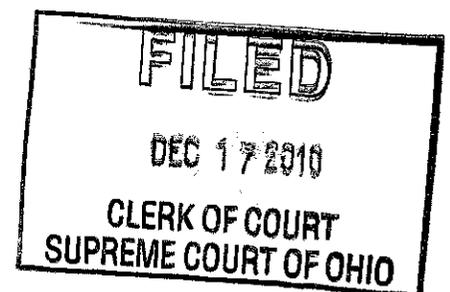


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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This felony appeal presents a critical Fourth Amendment issue: (1) whether the “Castle Doctrine,” which creates a presumption of self-defense, applies to force used against a law enforcement officer who has unlawfully entered a private residence.

“The maxim that ‘every man's house is his castle,’ is made a part of our constitutional law in the clauses prohibiting unreasonable searches and seizures, and has always been looked upon as of high value to the citizen.” “Accordingly,” says Lieber in his work on Civil Liberty and Self-Government, 62, in speaking of the English law in this respect, “no man's house can be forcibly opened, or he or his goods be carried away after it has thus been forced, except in cases of felony, and then the sheriff must be furnished with a warrant, and take great care lest he commit a trespass. This principle is jealously insisted upon.” Weeks v. United States (1914), 22 U.S. 383, 34 S.Ct. 341.

This firmly entrenched principle was the basis, in 1914, of the United States Supreme Court’s upholding of the Fourth Amendment and upholding the exclusionary rule. It is also this maxim which forms the foundation of the statutory provision in R.C. §2905.01, which establishes a presumption of self-defense when defensive force is used against a person who has unlawfully entered the home of the alleged assailant.

The Castle Doctrine has been codified in numerous states and was adopted by the Ohio General Assembly in 2008. This doctrine expressly establishes that a person does not have a duty to retreat from a residence or vehicle that she lawfully occupies before using force in self-defense or in defense of another, against a person who is unlawfully in the residence. The law expressly establishes that such force is presumed to be self-defense under those circumstances. This statute includes enumerated exceptions. If the assailant is not a lawful resident, then the

presumption does not apply. If the intruder is on the premises lawfully, the presumption does not apply.

The General Assembly does not include an exception for law enforcement officials. It stands to reason that a law enforcement officer who is lawfully entering into a home is excluded and it equally stands to reason that a law enforcement officer entering a home unlawfully is put in no better a position than any other intruder.

The Fourth District Court of Appeals has rendered a decision finding that a person charged with first degree felony felonious assault has no right of self-defense when force is used against police officers forcibly entering her home without a warrant and under no exigent circumstances.

The court relied on a public policy argument and attempted to bolster its decision with Columbus v. Fraley (1975) 41 Ohio St.2d 173, 324 N.E.2d 735.

Reliance on Fraley is misplaced when a person has been charged with an assault offense rather than resisting arrest. While resisting arrest may contain an assault component, arguably self-defense is not applicable to a charge of resisting arrest by virtue of Fraley. However, Fraley is expressly applicable only to a charge of resisting arrest. Self-defense is an affirmative defense that is available to a person charged with an assault.

The General Assembly provides a criminal penalty for persons who resist arrest. The General Assembly has expressly enhanced the penalty for an assault or a felonious assault when the complainant is a peace officer. The General Assembly expressly created exceptions to the Castle Doctrine. The General Assembly does not protect peace officers as a class from the presumption. However, a person using force against a peace officer who is lawfully entering the

premises cannot claim a presumption of self-defense and peace officer who is unlawfully entering the premises receives no favor by the General Assembly.

The Castle Doctrine represents the magnitude to which individuals value the inviolability of the home and the importance of its protection against intrusion by anyone unauthorized to intrude.

The appellate court's application of Fraley to this case creates an exception to the self-defense presumption that was not contemplated by the General Assembly, the implications of which create a slippery slope for the potential of abuse of power by police officers.

STATEMENT OF THE CASE AND FACTS

On or about April 24 and 25, 2009, Iva Browning was spending the weekend at a private campground in a mobile home permanently located in the resort area of Hickory Hills in Highland County, Ohio.

A Sheriff's Deputy investigated a disturbance, issued a warning and left. Shortly thereafter, he returned to investigate a second disturbance. During both contacts, Ms. Browning was locked in her mobile home and spoke to the officer only through a window.

During the second call, the Deputy took witness statements and decided to charge Ms. Browning with assault. He advised Ms. Browning through the window that she was under arrest. She refused to come out and demanded to see a warrant. The officer advised that he didn't need a warrant.

The officer called for backup to effectuate the arrest. The officer was not asked to obtain a warrant and did not arrive with one. Ms. Browning continued to refuse to exit or to admit the officers without a warrant. She was not armed and had no means of escaping the premises without the knowledge and observation of the officers. Neither officer had observed her outside

the premises at any time. Officers obtained a crowbar and pried the door open and entered the trailer.

The parties dispute the subsequent sequence of events, which resulted in Ms. Browning's arrest on two (2) counts of felonious assault, each a first degree felony, for throwing bleach at the officers. Ms. Browning claims that she acted in self-defense when officers rushed in and tried to tase her. She believed she had been shot and scooted through the narrow hallway on her backside screaming at the officers that they were violating her rights while they continued to try to subdue her. Once she was trapped in a corner in the bathroom, she said she felt a crushing blow between her legs and she reached for something to swing at the officers. Her hand fell on a bleach bottle, which had not been properly closed and which came open with the force of her swinging, splashing the officers.

The officers claim that Ms. Browning ran down a hallway and locked herself in a bedroom and that she threw the bleach at them when they forced the bedroom door open.

Ms. Browning was arrested on two counts of assault, each a first degree misdemeanor, involving the witnesses allegations, one count of resisting arrest, and two counts of felonious assault on a peace officer, each a first degree felony, in violation of R.C. § 2903.11.

The trial court overruled a Motion to Suppress, finding that exigent circumstances existed to justify the warrantless entry. The court also determined to tell the jury, over objection, that the officers were lawfully in the residence.

Ms. Browning was precluded during pretrial conferences to make any reference to self-defense until the court found she had not been responsible for creating the affray and that excessive or unnecessary force had been used. The court denied Ms. Browning's request for a self-defense instruction.

After a two (2) day jury trial, the jury was instructed on charges of felonious assault on a peace officer, attempted felonious assault on a peace officer, and assault on a peace officer.

After several hours of deliberation, the jury reached a compromised verdict of guilty on two (2) counts of attempt in violation of R.C. §§2923.02(A) and 2903.11(A)(1), each a second degree felony.

The trial court sentenced Ms. Browning to four (4) years on each count, to run consecutive to each other.

The Fourth District Appellate Court affirmed the conviction, holding (1) sound public policy requires a suspect to submit to arrest, even if law enforcement authorities have unlawfully entered a home; (2) even assuming that an officer's entry into the residence was unlawful, a defendant must show excessive and unnecessary force before being entitled to an instruction on self-defense; (3) the jury instruction stating that the officers were lawfully in the home was improper, but did not amount to reversible error; (4) there was sufficient evidence to sustain a finding of guilt on the attempted felonious assault charges; and (5) the verdicts were not against the manifest weight of the evidence.

The appellate court erred in applying Fraley to a charge of felonious assault on a peace officer, which deprives a citizen of the right to claim a privilege of self-defense against an officer who has unlawfully entered into a lawfully occupied residence.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: The "Castle Doctrine," which creates a presumption of self-defense, applies to force used against a law enforcement officer who has unlawfully entered a private residence.

The Fourth Amendment to the United States Constitution provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .” U.S. Const. am. 4.

Ohio provides an equivalent protection, with identical wording. Oh. Const. art. I; § 14.

The Fourth Amendment is applicable to the States through the Due Process Clause of the Fourteenth Amendment. Mapp v. Ohio (1961) 367 U.S. 643, 81 S.Ct. 1684.

Through a great body of constitutional jurisprudence, these amendments have been expounded, resulting in explanations, limitations, and exceptions.

Probable cause and exigent circumstances are required to support a warrantless arrest in the home, which is otherwise prohibited by the Fourth Amendment. Payton v. New York (1980) 445 U.S. 573, 100 S.Ct. 1371. Payton addressed the prohibition with regard to a felony offense. Id. at 583 – 590.

In attempting to clarify this matter, the Court has “emphasized that exceptions to the warrant requirement are “few in number and carefully delineated,”” Welsh v. Wisconsin (1984) 466 U.S. 740, 749, 104 S.Ct. 2091, citing United States v. United States District Court (1972) 407 U.S. 297, 318, 92 S.Ct. 2125. The Court has also held that “the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests.” Welsh, *supra*, 749-750.

The Welsh Court cites the following examples of the few emergency conditions sanctioned by the Court: hot pursuit of a fleeing felon, United States v. Santana (1976) 427 U.S. 38, 42-43, 96 S.Ct. 2406, and Warden v. Hayden (1967) 387 U.S. 294, 298-299, 87 S.Ct. 1642; ongoing fire, Michigan v. Tyler (1978) 436 U.S. 499, 509, 98 S.Ct. 1942. Welsh, *supra*, at 750.

“[A] search or seizure carried out on a suspect’s premises without a warrant is per se unreasonable, unless the police can show . . . the presence of ‘exigent circumstances.’ See Coolidge v. New Hampshire (1971) 403 U.S. 443, 474-475, 91 S.Ct. 2022, Michigan v. Clifford (1984) 464 U.S. 287, 296-297, 104 S.Ct. 641, Steagald v. United States (1981) 451 U.S. 204, 211-212, 101 S.Ct. 1642, McDonald v. United States (1948) 335 U.S. 451, 456, 69 S.Ct. 191, Boyd v. United States (1886) 116 U.S. 616, 630, 6 S.Ct. 524.

The exigent circumstances exception applies “when there is a reasonable basis for the police to believe that entry into a structure is necessary to protect or preserve life, or to avoid serious injury.” Mincey v. Arizona (1978) 437 U.S. 385, 392-393, 98 S.Ct. 2408.

Absent exigent circumstances, therefore, a law enforcement officer’s entry into a home without a warrant is an unlawful entry. Furthermore, a law enforcement officer’s trespass is more than merely unlawful, but it is proscribed with such force in our constitutional foundations that it is a violation of the most blatant sort.

In the case before this court, officers were acting on a misdemeanor complaint and no exigent circumstances justified the manner in which they forced their way into the Appellant’s home to effectuate an arrest.

It is clear that the entry was unlawful.

“ . . . [A] person is presumed to have acted in self defense . . . when using defensive force that is intended or likely to cause death or great bodily harm to another if the person against whom the defensive force is used is in the process of unlawfully and without privilege to do so entering, or has unlawfully and without privilege to do so entered, the residence or vehicle occupied by the person using the defensive force.” OHIO REV. CODE ANN. §2905.01(B)(1).

This provision, commonly referred to as the Castle Doctrine because of its foundation in the maxim “a man’s home is his castle,” was enacted by the Ohio General Assembly in September, 2008.

The Castle Doctrine recognizes the sanctity and privacy of one’s home and has been extended by several states, including Ohio, to include a person’s vehicle. Certain elements must be met for application of the Castle Doctrine, including (1) the use of defensive force that is intended or likely to cause death or great bodily harm; (2) the force must be used against a person who has unlawfully entered or is unlawfully entered the protected place; and (3) the person exerting the force must have a right to occupy the home or vehicle. OHIO REV. CODE ANN. §2905.01(B)(1)-(3).

Despite careful delineation, the General Assembly does not provide an exception for application of this presumption for law enforcement officers who are unlawfully entering a person’s residence. “This court has long held that statutory exceptions to the operations of laws should receive a strict interpretation.” Marano v. Gibbs (1989) 45 Ohio St.3d 310, 313, 544 N.E.2d 635, citing Kroff v. Amrhein (1916) 94 Ohio St. 282, 286, 114 N.E. 267. Thus, rules of statutory construction require a finding that the General Assembly intended to except from this statute only persons who were *lawfully and with a right to do so* entering into the residence of another.

Further, the appellate court’s reliance on this court’s decision in Columbus v. Fraley (1975) 41 Ohio St.2d 173, 324 N.E.2d 735, is misplaced.

In Fraley, this court addressed the constitutional issue of “fighting words.” The defendants had been arrested under a city ordinance for using obscene language. Defendants therein resisted their arrest. The court reversed the convictions, finding that the arrest was

unlawful, and then addressed the subsequent issue of whether the defendants were in violation of a Columbus ordinance that prohibited striking, assaulting, striking or brandishing a weapon at an officer while the officer was acting in the course of his or her duties. Id. at 178.

The argument advanced by the defendants was that they could not have violated the ordinance because they were not lawfully arrested.

This court recognized that there existed at common law a right to resist an unlawful arrest. Id., citing John Bad Elk v. United States (1900) 177 U.S. 529, 20 S.Ct. 729.

However, adopting the positions of the New Jersey Superior Court and the Supreme Court of Alaska, this court ultimately held that “in the absence of excessive or unnecessary force by an arresting officer, a private citizen may not use force to resist arrest by one he knows, or has good reason to believe, is an authorized police officer engaged in the performance of his duties, whether or not the arrest is illegal under the circumstances.” Id. at 180.

The Fraley case specifically addresses the act of resisting arrest, which is an offense codified by the General Assembly.

The Fourth District Appellate Court declined to apply Fraley in 1992 to a case involving a conviction for resisting arrest in violation of a Gallipolis Ordinance in which the Gallipolis statute expressly prohibited resisting a *lawful* arrest. State v. Lamm (1992) 80 Ohio St.3d 510, 515, 609 N.E.2d 1286.

However, it resorted to Fraley to deny Ms. Browning’s right to exert a claim of self-defense against two first degree felony charges of felonious assault arising after two officers forcibly gained entry to her trailer without a warrant and without exigent circumstances.

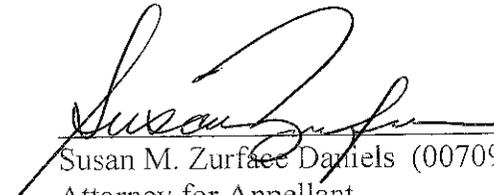
Application of a Fraley standard to cases of assault or felonious assault denies a person the right to present a statutorily created affirmative defense under any circumstance. More

particularly, however, its application is in direct opposition to the statutory provisions of the Castle Doctrine. Fourth Amendment jurisprudence does not contemplate the creation of conditions that foster potential for abuse by overzealous police officers.

CONCLUSION

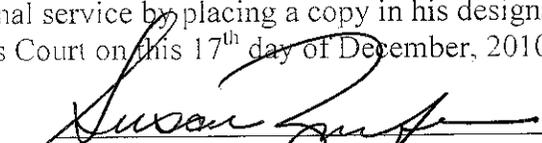
For the above noted reasons, this felony appeal involves a matter of public and great general interest and also presents a substantial constitutional question. The Appellant respectfully requests that this court accept jurisdiction in this case so that these issues may be reviewed on their merits.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of this Memorandum in Support of Jurisdiction was duly served upon James B. Grandey, Highland County Prosecutor, 112 Gov. Foraker Place, Hillsboro, Ohio 45133 via personal service by placing a copy in his designated mail box in the Highland County Common Pleas Court on this 17th day of December, 2010.


Susan M. Zurface Daniels

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HIGHLAND COUNTY

FILED
COURT OF APPEALS
HIGHLAND COUNTY, OHIO

NOV 02 2010

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STATE OF OHIO, :
Plaintiff-Appellee, : Case No. 09CA36
vs. :
IVA J. BROWNING, : DECISION AND JUDGMENT ENTRY
Defendant-Appellant. :

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CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:

ABELE, J.

This is an appeal from a Highland County Common Pleas Court judgment of conviction and sentence. A jury found Iva Browning, defendant below and appellant herein, guilty of two counts of attempted felonious assault on a peace officer in violation of R.C. 2923.02 and R.C. 2903.11(A)(1).

Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN FINDING THAT THE OFFICERS' WARRANTLESS ENTRY INTO THE

DEFENDANT'S PRIVATE VACATION HOME DID NOT VIOLATE THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 14 OF THE OHIO CONSTITUTION WHEN THE STATE FAILED TO SHOW EXIGENT CIRCUMSTANCES OR ANY OTHER VALID EXCEPTION TO THE WARRANT REQUIREMENT."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT MISAPPLIED THIS COURT'S HOLDING IN STATE V. NEAL AND THE OHIO SUPREME COURT'S HOLDING IN COLUMBUS V. FRALEY AND ERRED IN DENYING DEFENDANT-APPELLANT'S REQUEST TO PRESENT EVIDENCE OF SELF-DEFENSE AND IN DENYING APPELLANT'S REQUEST FOR A SELF-DEFENSE INSTRUCTION."

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT 'THE DEPUTIES HAD A LEGAL RIGHT TO ENTER THE TRAILER TO ARREST THE DEFENDANT' AS WARRANTLESS ENTRY WAS NOT A FACT THAT NEEDED TO BE PROVEN OR DISPROVEN AND SIMPLY CREATED A PREJUDICIAL SITUATION WHERE THE JURY WAS LED TO BELIEVE THAT THE ACTIONS OF LAW ENFORCEMENT OFFICERS WERE LEGITIMATE."

FOURTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT'S CRIM.R. 29(A) MOTION FOR ACQUITTAL ON THE GROUNDS THAT, WHEN VIEWED IN A LIGHT MOST FAVORABLE TO THE PROSECUTION, THE STATE HAD FAILED AT THE CLOSE OF ITS EVIDENCE TO MEET ITS BURDEN ON ESSENTIAL ELEMENTS OF EACH CHARGE."

FIFTH ASSIGNMENT OF ERROR:

"THE VERDICTS FINDING DEFENDANT GUILTY OF ATTEMPTED FELONIOUS ASSAULT IN VIOLATION OF O.R.C. §2923.02(A) AND O.R.C. §2903.11(A)(1) WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, AS ALL PHYSICAL EVIDENCE PRESENTED AT TRIAL SUPPORTED THE DEFENDANT'S VERSION OF THE EVENTS AND DID NOT SUPPORT THE OFFICERS'

TESTIMONY."

SIXTH ASSIGNMENT OF ERROR:

"THE VERDICTS FINDING DEFENDANT GUILTY OF ATTEMPTED FELONIOUS ASSAULT IN VIOLATION OF O.R.C. §2923.03(A) AND O.R.C. §2923.11(A)(1) WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE, AS THE STATE FAILED TO PRESENT ANY EVIDENCE SUPPORTING THE OFFICERS' VERSION OF THE EVENTS."

Late in the evening on April 24, 2009, someone notified the Highland County Sheriff's Office that a lady was "gettin' assaulted with a pair of scissors" at the Hickory Hills campground. Deputy Ronnie Hughes arrived at the scene and met with the alleged victim, Dorothy Ellis. Ellis identified appellant as the perpetrator, but said that she did not want to press charges. Deputy Hughes went to the appellant's camper to speak with her and warn her that if he had to return to the campground that night, someone would be going to jail.

Less than an hour after the first call, the Sheriff's Department received a second call indicating that appellant was driving up and down a campground road and threatening people. When Deputy Hughes returned to the scene, appellant was in her camper. Deputy Hughes told appellant that she was under arrest, but she refused to exit the camper or let him inside. After a short argument, Deputy Hughes called for back-up.

A short time later, Deputy Michael Gaines arrived on the scene. When appellant still refused to come out, the deputies

used a crow-bar to open the camper door. Once the door came open, Deputy Hughes attempted to grab appellant's wrist, but she escaped his grasp and ran to a back bedroom and locked the door. After the deputies broke down the bedroom door and attempted to enter the bedroom, appellant threw bleach into their faces and forced them to retreat. Outside, various bystanders brought water to them to wash their eyes. Deputy Hughes eventually subdued and arrested appellant. She was later transferred to the local jail and accused the deputies of sexual assault.

The Highland County Grand Jury returned an indictment charging appellant with two counts of assault on a peace officer. She pled not guilty to both charges and filed a motion to suppress (1) the statements she made to Sheriff's deputies during custodial interrogation, and (2) any evidence of the assault. Appellant argued that the deputies unlawfully entered appellant's camper and, thus, any evidence of the assault should be suppressed.

The trial court partially sustained her motion. The court suppressed a recorded statement, but allowed other statements to be admitted into evidence. Concerning to the suppression of the evidence of the assaults, the court ruled that exigent circumstances justified the forced entry. Moreover, the court concluded that even if entry was unlawful, appellant "had no right to commit an assault against the Deputies by throwing

bleach in their faces and eyes.”

At the November 2009 jury trial, Deputies Hughes and Gaines recounted their version of the events. Dr. Thomas Randall, the emergency physician who treated the deputies, testified about the severity of the pain they experienced and the potential for permanent eye damage. Deputies Rob Music and Erica Engle both testified that during their encounters with appellant, she freely admitted the assaults, but claimed that she acted in self-defense and also stated that she had been sexually assaulted.

Appellant testified in her own defense and explained that she refused to exit the camper because outside a crowd of people were calling her “Bitch. Cunt. ***Slut.” and she was frightened. Further, when the deputies entered the camper, she claimed they tasered her breast and called her a “bitch.” Appellant did admit that she threw the bleach at the deputies, but only after she received a “crushing blow to [her] vaginal” area.

Appellant had requested a self-defense instruction, but after she rested her case the trial court refused to give the request and instruction. Subsequently, the jury returned verdicts finding appellant not guilty of felonious assault, but guilty of the lesser offense of attempted felonious assault against the deputies. The trial court sentenced appellant to serve consecutive four year prison terms for each count. This appeal followed.

I

In her first assignment of error, appellant asserts that the trial court erred by overruling a portion of her motion to suppress evidence. In particular, appellant argues that the court's conclusion that "exigent circumstances" justified the "forced entry" into the camper is erroneous.

Initially, we note that appellate review of a motion to suppress evidence decision involves mixed questions of law and fact. State v. Grubb, 186 Ohio App.3d 744, 930 N.E.2d 380, 2010-Ohio-1265, at ¶12; State v. Book, 165 Ohio App.3d 511, 847 N.E.2d 52, 2006-Ohio-1102, at ¶9. In hearing such motions, courts assume the role of trier of fact and are in the best position to resolve factual disputes and evaluate witnesses credibility. State v. Roberts, 110 Ohio St.3d 71, 850 N.E.2d 1168, 2006-Ohio-3665, at ¶100; State v. Burnside, 100 Ohio St.3d 152, 797 N.E.2d 71, 2003-Ohio-5372, at ¶8.

Generally, appellate courts will accept a trial court's factual finding if competent and credible evidence supports the finding. State v. Little, 183 Ohio App.3d 680, 918 N.E.2d 230, 2009-Ohio-4403, at ¶15; State v. Medcalf (1996), 111 Ohio App.3d 142, 145, 675 N.E.2d 1268. However, appellate courts conduct a de novo review of a trial court's application of law to those facts. State v. Higgins, 183 Ohio App.3d 465, 917 N.E.2d 363, 2009-Ohio-3979, at ¶14; State v. Poole, 185 Ohio App.3d 38, 923

N.E.2d 167, 2009-Ohio-5634, at ¶18. With this in mind, we turn our attention to the facts adduced at the suppression hearing.

In the case sub judice, the trial court found that Deputy Hughes arrived at appellant's camper, knocked on the door, conversed with her through an open window and informed her that she was under arrest. Appellant, however, refused to exit the camper and refused to allow Deputy Hughes to enter. After Deputy Gaines arrived, appellant again refused to exit or to let the deputies enter. However, our review of the record reveals no evidence to indicate that the officers interacted with appellant outside the camper and that she retreated inside the camper.

The Fourth Amendment to the United States Constitution guarantees the rights of people "to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures[.]"¹ (Emphasis added.) The touchstone of Fourth Amendment jurisprudence is that searches and seizures must be "reasonable." See Wilson v. Arkansas (1995), 514 U.S. 927, 931, 131 L.Ed.2d 976, 115 S.Ct. 1914; New Jersey v. T.L.O. (1985), 469 U.S. 325, 337, 83 L.Ed.2d 720, 105 S.Ct. 733; AL Post 763 v. Ohio

¹ Fourth Amendment protections are applicable to the states through the Fourteenth Amendment Due Process Clause. See Smith v. Maryland (1979), 442 U.S. 735, 736, 61 L.Ed.2d 220, 99 S.Ct. 2577; Mapp v. Ohio (1961), 367 U.S. 643, 655, 6 L.Ed.2d 1081, 81 S.Ct. 1684. Although Section 14, Article I, Ohio Constitution, offers substantially the same protections, see State v. Jaeger (Jul. 9, 1993), Washington App. No. 92CA30, we confine our analysis to federal constitutional provisions.

Liquor Control Comm. (1998), 82 Ohio St.3d 108, 111, 694 N.E.2d 905. The question of whether a peace officer's warrantless entry into a home is reasonable requires an analysis of the sequential and consequential events that led up to and included the entry. State v. Huff (Jun. 10, 1999), Highland App. No. 98CA23; State v. Russell (Apr. 29, 1998), Summit App. Nos. 18206 & 18207, unreported.

Here, the trial court concluded that "exigent circumstances" justified the warrantless and forced entry into the camper. We respectfully disagree. Although the "exigent circumstances" exception to the Fourth Amendment warrant requirement may, at times, appear to be somewhat amorphous, it can include such situations as (1) a danger exists to the peace officers or others within the home, State v. Clark, Williams App. No. WM-09- 009, 2010-Ohio-2383, at ¶25, (2) imminent danger that evidence may be lost or destroyed, State v. Holt, Marion App. No. 9-09-39, 2010-Ohio-2298, at ¶29, and (3) peace officers in "hot pursuit" of a suspect. Toledo v. Colbert, Lucas App. No. L-08- 1209, 2009-Ohio-2766, at ¶46. We find that none of these types of situations apply here.

We recognize that the trial court's exigent circumstances finding is based upon the very real concern that "further confrontations would have occurred" if Deputy Hughes had left the scene to obtain a warrant. However, the deputy could have called

for assistance, which, in fact, he did, and then obtain a warrant. Deputy Gaines could have controlled the scene and, if necessary, to detain appellant if she emerged from the camper.

Thus, we do not agree that based upon those particular facts, exigent circumstances justified a forced, warrantless entry into appellant's camper. That, however, does not end the matter.

As the trial court aptly noted, even if the officers' entry was unlawful, appellant did not have the right to assault the deputies, nor does it shield her from the consequences of her actions. Our Eighth District colleagues addressed a similar situation and held that "violence against an officer after he has gained entrance into the residence, albeit unlawfully, with a purpose to cause physical injury rather than to resist entry, is not privileged conduct. Such conduct not only impedes the police but endangers all parties involved." Middleburg Heights v. Theiss (1985), 28 Ohio App.3d 1, 5, 501 N.E.2d 1226.

We believe that whatever limited right appellant had to resist the unlawful entry, that right vanished once the deputies were inside and appellant's subsequent *actus reus*, i.e. throwing bleach in the deputies' faces when they entered the bedroom, constitutes an "independent criminal act." See State v. Trammel (Jan. 22, 1999), Montgomery App. No. 17196. Further, regardless of whether the entry was lawful, the Fourth Amendment does not

confer a right on suspects to assault peace officers. See State v. McCoy, Montgomery App. No. 22479, 2008-Ohio-5648, at ¶19 (discussing a homeowner's right to use "deadly force").

We fully agree with the trial court that sound public policy requires a suspect to submit to arrest, even if law enforcement authorities have unlawfully entered a home. Physical confrontation serves no purpose and endangers everyone. If authorities have indeed acted unlawfully, other means exist to addressing those actions, including actions in courts of law.

Our conclusion comports with decisions from other jurisdictions that have confronted this issue. See e.g. U.S. v. Waupekenay (C.A.10 1992), 973 F.2d 1533, 1537 (unlawful entry did not require suppression of evidence that occupant pointed a firearm at officers); People v. Klimek (Ill.App. 1981), 427 N.E.2d 598, 603 (exclusionary rule does not reach so far as to suppress evidence of a defendant's unlawful conduct in response to police actions in violation of the Fourth Amendment); New Mexico v. Travison (NM.App. 2006), 149 P.3d 99, 102 (exclusionary rule does not foreclose the use of evidence obtained in response to the officers' entry).

For these reasons, we believe the trial court's conclusion to refuse to suppress evidence of the assaults against Deputies Hughes and Gaines is correct, albeit for different reasons. Consequently, we hereby overrule appellant's first assignment of

error.

II

In her second assignment of error, appellant asserts that the trial court erred by refusing to give the jury a "self-defense" instruction. Although a trial court has the discretion to fashion jury instructions, a court must give a particular instruction if the evidence warrants such instruction. The standard of review, therefore, is whether "the trial court abused its discretion by finding that the evidence was insufficient to support the requested charge." Smith v. Redecker, Athens App. No. 08CA33, 2010-Ohio-505, at ¶52.

Generally, an abuse of discretion is more than an error of law or judgment; rather, it implies that a court's attitude is unreasonable, arbitrary or unconscionable. State v. Herring (2002), 94 Ohio St.3d 246, 255, 762 N.E.2d 940; State v. Clark (1994), 71 Ohio St.3d 466, 470, 644 N.E.2d 331. Furthermore, when considering the abuse of discretion standard of review, appellate courts must not simply substitute their judgment for that of the trial court. State ex rel. Duncan v. Chippewa Twp. Trustees (1995), 73 Ohio St.3d 728, 732, 654 N.E.2d 1254; Berk v. Matthews (1990), 53 Ohio St.3d 161, 169, 559 N.E.2d 1301.

In the case sub judice, the trial court declined to give self-defense instruction for two reasons (1) appellant created the situation, and (2) the Ohio Supreme Court has held "[i]n the

absence of excessive or unnecessary force by an arresting officer, a private citizen may not use force to resist arrest by one he knows . . . is an authorized police officer engaged in the performance of his duties, whether or not the arrest is illegal under the circumstances." See Columbus v. Fraley (1975) 41 Ohio St.2d 173, 324 N.E.2d 735, at paragraph three of the syllabus. Appellant argues that the trial court misapplied the Fraley case. We, however, disagree with appellant.

During her testimony, appellant admitted that Deputy Hughes was in uniform when he approached her camper and that he informed her that she was under arrest. Thus, appellant was unquestionably aware that Deputy Hughes is a peace officer and engaged in the performance of his duties. Also, we find no evidence of "excessive" or "unnecessary" force. Prying open of the front door and knocking down the bedroom door is force applied to appellant's property, not to appellant herself.

We recognize that appellant testified that one of the deputies tasered her and then she felt something hit her in the vaginal area. However, even if we assume that entry into the camper and appellant's arrest was unlawful, the fact remains that the deputies were attempting to subdue a recalcitrant suspect who chose to scuffle with them. After our review, we find nothing excessive or unnecessary concerning the degree of force applied, and, thus, no abuse of discretion by the trial court in

determining that the evidence did not warrant a self-defense instruction.

Accordingly, we hereby overrule appellant's second assignment of error.²

III

In her third assignment of error, appellant asserts that the jury instructions, wherein the trial court pronounced "the deputies had a legal right to enter the trailer to arrest the defendant," were irrelevant to the charges against her and created a "prejudicial situation" that led the jury to believe the deputies actions were justified.

In light of our resolution of appellant's first assignment of error, we agree with appellant that this portion of the instruction was improper. We, however, disagree that the instruction amounts to reversible error.

The Ohio Supreme Court has stated that "[r]eversible error ordinarily can not be predicated upon . . . one sentence or one phrase of the general charge." (Emphasis added.) State v. Porter (1968), 14 Ohio St.2d 10, 13, 235 N.E.2d 520; also see Snyder v. Stanford (1968), 15 Ohio St.2d 31, 238 N.E.2d 563, at paragraph three of the syllabus. Jury instructions must be reviewed in

²The text of appellant's assignment of error also asserts that the trial court misapplied our holding State v. Neal, Highland App. No. 03CA19, 2004-Ohio-6823. However, as the trial court was clearly correct in declining the instruction under Fraley, we need not, and do not, address that argument.

their entirety to determine if a defendant suffered prejudice. State v. Wagner, Cuyahoga App. No. 93432, 2010-Ohio-2221, at ¶43; State v. Covington, Franklin App. No. 06AP-826, 2007-Ohio-5008, at ¶3; State v. Teachout, Lake App. No. 2006-L-081, 2007-Ohio-1642, at ¶19. In the case at bar, after our review of the jury instructions as a whole, we are not persuaded that this one misstatement had any prejudicial effect.

Appellant does not claim that the trial court's instructions on the actual elements of the offense were erroneous, and we find no error in our own review of the remaining charge. Also, we find no claim of any other error in the lengthy jury instructions. We concede that the instructions indicated that the officers possessed a "legal right to enter the trailer," but we are not persuaded that this language caused a "prejudicial situation."

We also hasten to add that the issue was not whether the deputies had a legal right to be in the camper, but rather whether appellant assaulted them. Although the deputies had no legal right to force entry, they did have a legal right to be free of assault and appellant was not privileged to perpetrate an assault simply because of their forced entry. Appellant admitted that she threw bleach in their faces and we cannot find anything more than harmless error in the trial court's misstatement of the jury instructions. See Crim.R. 52(A).

For these reasons, we find no merit in the third assignment of error and it is thus overruled.

IV

We jointly consider appellant's fourth and sixth assignments of error because they raise similar issues. Appellant argues that the trial court erred by overruling her Crim.R. 29(A) motion for acquittal and that the verdicts are not supported by sufficient evidence. Our standard of review for both arguments is the same. See State v. Jackson, Ross App. No. 09CA3120, 2010-Ohio-1846, at ¶5; State v. Hairston, Scioto App. No. 06CA3081, 2007-Ohio-3880, at ¶16. Here, we must determine whether the evidence adduced at the trial, if believed, supports a finding of guilt beyond a reasonable doubt. See State v. Thompkins (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541; State v. Jenks (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492.

With regard to the Crim.R. 29(A) motion, appellant contends that she should have been granted a judgment of acquittal because no evidence was adduced to prove the "serious physical harm" element of R.C. 2903.11(A)(1).³ We disagree with appellant.

"Serious physical harm" is defined under R.C. 2901.01(A)(5)(c) &(e) as including, inter alia, harm which produces "temporary, substantial incapacity" or "acute pain of

³R.C. 2903.11(A)(1) states, inter alia, "[n]o person shall knowingly * * * [c]ause serious physical harm to another . . ."

such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain." At trial, Dr. Randall expressly opined, based upon his training and experience as an emergency room physician, that the bleach caused Deputy Hughes to sustain a "temporary substantial incapacity." The eye burns Deputy Gaines received was not as severe, but Dr. Randall testified that both of them experienced "prolonged or intractable pain." The witness further related that on a scale of one to ten, Deputy Hughes reported his pain at an eight, while Deputy Gaines reported a five.

The deputies also testified concerning the "temporary substantial incapacity." On cross-examination, Deputy Hughes testified that he could not recall his location in the camper after the bleach was thrown because he "couldn't see." Deputy Gaines also related on direct that after they went outside to flush their eyes, they had to return to the camper "with limited vision" to arrest appellant. We note that diminished vision is a "substantial incapacity" for deputies who, having already suffered an assault, must return to the camper and arrest their assailant. Thus, we believe that sufficient evidence of "serious physical harm" supported the trial court's denial of appellant's Crim.R. 29(A) motion.

As to appellant's general claim of insufficient evidence in her sixth assignment of error, appellant incorporates the

arguments made with respect to her fourth assignment of error. Here, in light of the fact that we have already found no error with the trial court's denial of the Crim.R. 29(A) motion, we need not further address that point any further.

Appellant also asserts that the evidence is insufficient due to a lack of "physical evidence" to corroborate the deputies' testimony. Here, no corroborating evidence is necessary. It is well-settled that the weight of the evidence and credibility of witnesses are issues for the jury as the trier of fact. State v. DeHass (1967), 10 Ohio St.2d 230, 231, 227 N.E.2d 212; State v. Antill (1964), 176 Ohio St. 61, 67, 197 N.E.2d 548. A jury is free to believe all, some, or none of a particular witness's testimony. State v. Caldwell (1992), 79 Ohio App.3d 667, 679, 607 N.E.2d 1096. In the case sub judice, the jury obviously found the testimony from Deputy Hughes and Deputy Gaines credible and their testimony is sufficient to sustain the jury verdicts.

For all of these reasons, we conclude that sufficient evidence was adduced to support the trial court's denial of appellant's Crim.R. 29(A) motion, as well as the jury verdicts. Accordingly, we hereby overrule appellant's fourth and sixth assignments of error.

v

In her fifth assignment of error, appellant asserts that the verdicts are against the manifest weight of the evidence. In

particular, she maintains that the "physical evidence" supports her version of events. Appellant also takes issue with the fact that the jury was not permitted to take into account (1) whether the deputies lawfully entered her camper, or (2) whether she acted in self-defense.

When reviewing a claim that a verdict is against the manifest weight of the evidence, an appellate court may not reverse the conviction unless it is obvious that 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. See State v. Earle (1997), 120 Ohio App.3d 457, 473, 698 N.E.2d 440; State v. Garrow (1995), 103 Ohio App.3d 368, 370-371, 659 N.E.2d 814.

In the instant case, regardless of the "physical evidence" to which appellant refers, the jury obviously believed the deputies' testimony. We are not persuaded this amounted to a manifest miscarriage of justice. Furthermore, as we previously noted, we agree that the deputies did not lawfully enter the camper, but that fact is irrelevant because appellant's assault is an independent criminal act that the unlawful entry does not justify. Furthermore, as we stated earlier, appellant was not entitled to use force to resist the arrest, even if the entry and arrest were indeed unlawful. Accordingly, we hereby overrule appellant's fifth assignment of error.

Having reviewed all errors that appellant assigned and argued in her brief, we hereby affirm the trial court's judgment. is hereby affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the 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 Highland County Common Pleas Court to carry this judgment into execution.

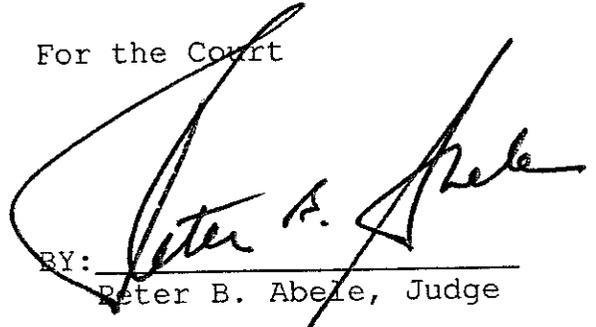
If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

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

McFarland, P.J. & Kline, J.: Concur in Judgment & Opinion

For the Court

BY: 
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.