THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2004-T-0118**
- vs -	:	
MICHAEL CAYSON,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 03 CR 803.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481 (For Plaintiff-Appellee).

Michael A. Partlow, Morganstern, MacAdams & DeVito Co., L.P.A., 623 West St. Clair Avenue, Cleveland, OH 44113 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, Michael Cayson ("Cayson"), appeals the judgment entered by the Trumbull County Court of Common Pleas. Cayson received a total prison term of nine years for his convictions of felonious assault, abduction, and having a weapon while under disability.

{¶2} The relevant facts established at trial are as follows. The victim in this matter was Tricia Brown ("Brown"). Brown and Cayson had a relationship that lasted approximately three years. Both Cayson and Brown maintained separate residences. At the time of the offense, Brown lived in a residence on Jefferson Street in Warren, Ohio. She testified that during their relationship, Cayson had visited her at that house numerous times, had spent the night there, and, at one time, had a key. The relationship ended in September 2003.

{¶3} Cayson was a truck driver. On October 12, 2003, he called Brown and told her he was out of town at a truck stop. Brown testified that Cayson may have said he was in Maryland.

{¶4} During the evening of October 12, 2003, Cheryl Davis ("Davis") picked up Brown's children to watch them, as Brown was scheduled to work a midnight shift at Kraftmaid. After the children left, one of Brown's co-workers, Gary Bercheni ("Bercheni"), visited her at her residence. He was there to get his hair "cornrowed." Brown operated a part-time hairstyling business in an upstairs room she used as a salon.

{¶5} After Bercheni arrived, Brown decided to get ready for work prior to doing Bercheni's hair. She testified she undressed in her upstairs bedroom and wrapped herself in a towel to go downstairs to shower in the bathroom. At that time, she heard a knocking on the door downstairs, which quickly turned into banging. Brown looked out the window of the salon room and observed a gold-colored SUV, which resembled a vehicle owned by Cayson's brother.

{¶6} Carrying her telephone, Brown went downstairs to investigate the banging situation. She asked who was at the door, but her calls went unanswered. When she reached the bottom of the stairs, she locked the door and called Davis. Brown informed Davis that someone was in her house.

{¶7} Shortly after calling Davis, Brown watched as Cayson opened the front door and entered her home carrying a handgun. Cayson called Brown a "bitch" and started beating her. Brown fell to the floor, where Cayson kicked her and continued to beat her. While Brown was on the floor, Cayson's gun went off. After the gun discharged, Cayson started to run upstairs, and Brown ran out the front door. Cayson then turned around and chased Brown outside.

{¶8} In the front yard, Cayson caught up with Brown, punched her and knocked her to the ground. Then he forced her into the SUV, but Brown was able to exit the vehicle when Cayson was trying to get in. Brown ran across the street, and Cayson chased after her. Cayson again knocked Brown to the ground, and she landed in a ditch, completely naked. Cayson began pulling on Brown's arm to get her out of the ditch. As a result, Brown suffered a dislocated shoulder. As Cayson was pulling on Brown's arm, Davis arrived and convinced Cayson to let her take Brown to the hospital.

{¶9} Cayson was indicted on one count of felonious assault, a second-degree felony, in violation of R.C. 2903.11(A)(1) and (D), with an accompanying firearm specification; abduction, a third-degree felony, in violation of R.C. 2905.02(A)(1) and (B), also with a firearm specification; and having a weapon while under disability, a fifth-degree felony, in violation of R.C. 2923.13(A)(3) and (C). Cayson pleaded not guilty to these charges, and a jury trial was held.

{¶10} Cayson was sentenced to a six-year prison term on the felonious assault conviction. He received a three-year term for the accompanying firearm specification, to be served prior to and consecutive with the six-year term. In addition, Cayson was sentenced to a one-year term on the abduction conviction and a six-month term on the having a weapon while under disability conviction. These sentences were ordered to be served concurrently with the sentence imposed for the felonious assault conviction.

{¶11} Cayson raises three assignments of error. His first assignment of error is:

{¶12} "The trial court erred in denying appellant's request to instruct the jury as to the lesser included offense of aggravated assault for the offense of felonious assault."

{¶13} Cayson requested a jury instruction on aggravated assault. Aggravated assault is an offense of an inferior degree to felonious assault. *State v. Deem* (1988), 40 Ohio St.3d 205, paragraphs two and four of the syllabus. This is because the elements of aggravated assault are identical to the elements of felonious assault, except that aggravated assault has an additional mitigating element. Id. at paragraph four of the syllabus. The additional mitigating element is that the offender acted under "serious provocation." R.C. 2903.11 and R.C. 2903.12. Aggravated assault is defined in R.C. 2903.12, which provides, in part:

{¶14} "(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:

{¶15} "(1) Cause serious harm to another or another's unborn; ***."

{¶16} The Supreme Court of Ohio has held, "in a trial for felonious assault, where the defendant presents sufficient evidence of serious provocation, an instruction on aggravated assault must be given to the jury." *Deem* at paragraph four of the syllabus. If the evidence presented does not meet this test, an instruction on aggravated assault is not required. Cf. *State v. Shane* (1992), 63 Ohio St.3d 630, 632, citing *State v. Kidder* (1987), 32 Ohio St.3d 279, 282-283.

{¶17} "Provocation, to be serious, must be reasonably sufficient to bring on extreme stress and the provocation must be reasonably sufficient to incite or to arouse the defendant into using deadly force. In determining whether the provocation was reasonably sufficient to incite the defendant into using deadly force, the court must consider the emotional and mental state of the defendant and the conditions and circumstances that surrounded him at the time." *Deem* at paragraph five of the syllabus.

{¶18} The analysis of sufficient evidence of adequate provocation requires a two-part inquiry. First, an objective standard must be applied to determine whether the alleged provocation is reasonably sufficient to bring on a sudden passion or fit of rage. *State v. Mack*, 82 Ohio St.3d 198, 201, 1998-Ohio-375. "'In determining whether the provocation was reasonably sufficient *******the court must consider the emotions and mental state of the defendant and the conditions and circumstances that surround him at the time.'" (Citation omitted.) Id. at 200. The provocation *must be occasioned by the victim* and "must be sufficient to arouse the passions of an ordinary person beyond the power of his or her control." *Shane* at 635. If the objective standard is met, the inquiry shifts to a subjective standard, to determine whether the defendant in the particular case "actually was under the influence of sudden passion or in a sudden fit of rage. ***"

Id. at 634. Thus, the determination of adequate provocation necessarily involves a factual analysis. Under the facts of this case, it is clear that the first prong of the objective standard of the provocation inquiry was not met.

{¶19} Cayson argues that the provocation in this matter was seeing Brown come down from upstairs, wrapped only in a towel, when he suspected another man was in her residence.

{¶20} Initially, we address the objective prong of the *Mack/Shane* test. We again note that the provocation must be occasioned by the victim and must be "sufficient to arouse the passions of an ordinary person beyond the power of his or her control." *Shane* at 635.

{¶21} The facts revealed at trial established that Cayson and Brown were not married to each other and resided at separate residences. Brown testified that she and Cayson had ended their relationship by September of 2003. Cayson, uninvited, entered into Brown's home to find her "wrapped in a towel."

{¶22} Here, Brown did nothing to provoke Cayson into a sudden fit of rage. Brown testified that she was in her home when Cayson, uninvited, entered onto her premises. Cayson immediately began to attack Brown. After the initial attack, she attempted to escape from Cayson who chased after her, outside and across the street. As in *Deem*, *Shane,* and *Mack*, the evidence is clear that Cayson was the aggressor in the case sub judice and brought the conflict to Brown, not the reverse. Brown's condition of being discovered by Cayson in a wrapped towel, coming down a stairway in her own separate premises can in no way be construed as providing reasonably sufficient provocation for Cayson's actions.

{¶23} Assuming arguendo that Cayson's assertion was correct that Brown was having an affair, or was engaging in sexual activity on the night of the incident, it is clear to this court that evidence of two adults engaging in consensual sex is not a serious provocation occasioned by the victim as required for an instruction as to aggravated assault under R.C. 2903.12(A).

{¶24} Although the parties were not married in the case sub judice, we believe a review of the opinion in *Shane* is instructional as to whether suspected infidelity equates to serious provocation. In *Shane,* the Supreme Court of Ohio held "[w]e disapprove of a rule which does not allow 'mere words' to be sufficient provocation to reduce murder to manslaughter generally, but which makes a specific exception where the provocation consists of mere words by one spouse informing the other spouse of infidelity." Id. at 637. The Court stated: "[t]his exception to the general rule has its foundation in the ancient common-law concept that the wife is the property of the husband. *** 'When a man is taken in adultery with another man's wife, if the husband shall stab the adulterer, or knock out his brains, that is bare manslaughter: for jealousy is the rage of a man, and adultery is the highest invasion of property ***.'" (Citation omitted.) Id. at 637.

{¶25} The court concluded: "[t]his archaic rule has no place in modern society. Words informing another of infidelity should not be given special treatment by courts trying to determine what provocation is reasonably sufficient provocation." Id. A spouse's confession of adultery is not reasonably sufficient provocation to transform a felonious assault into the inferior offense of aggravated assault. Id. Likewise, the testimony of a third person establishing the existence of an affair could not constitute provocation. *State v. Dixon*, 10th Dist. No. 03AP-564, 2004-Ohio-3374, at ¶14.

{¶26} In *State v. Elson* (June 9, 1997), 5th Dist. No. 1996CA00142, 1997 Ohio App. LEXIS 3207, at 5-6, the court held that trial counsel did not err by failing to proffer expert testimony that the sight of appellant's ex-wife with her new paramour "caused extreme rage in appellant," as the testimony was inadmissible to show appellant's state of mind "absent a showing that the victims did something to provoke appellant into using deadly force." See, also, *Dixon* at ¶14. Thus, under our present statutory scheme, simple awareness of one party to a relationship of the existence of a sexual relationship between another party and a third person is insufficient, of itself, to establish serious provocation.

{¶27} We conclude that the circumstances of this case, as established by the evidence, fail to meet the objective standard of the two-part inquiry required to demonstrate reasonably sufficient provocation to justify a jury instruction on the offense of aggravated assault. Further, Brown's actions were blameless, and insufficient to arouse the passions of an ordinary person beyond the power of his or her control. Thus, the totality of the evidence in this case does not raise any possibility that Cayson's conduct was the result of serious provocation occasioned by Brown.

{¶28} Even if it could be argued that the objective prong of the *Mack/Shane* test was satisfied, Cayson's argument fails under the subjective prong of the test. The evidence did not suggest that Cayson was in a sudden fit of rage or under the influence of sudden passion. Brown testified that on the day of the attack, Cayson called her and informed her that he was at an out of state truck stop. She also testified that their relationship had terminated. That night, Cayson showed up at her residence, unannounced and uninvited, and began pounding on the door. Brown did not open the

front door. Instead, Cayson turned the door knob and let himself in, holding a gun in his hand. This fact pattern suggests Cayson "set a trap" for Brown by first telling her he was out of state and then stalking her residence until he thought another man was present. Such actions are wholly inconsistent with a "sudden" fit of passion or rage. Instead, they suggest a preplanned attack.

{¶29} On the basis of the foregoing, the court did not err by failing to instruct the jury on aggravated assault. Cayson's first assignment of error is without merit.

{¶30} Cayson's second assignment of error is:

{¶31} "The trial court erred and abused its discretion when it refused to allow appellant to introduce additional evidence regarding an affair between the alleged victim and another man."

{¶32} During his cross-examination of Brown, defense counsel asked Brown whether she had sex with Bercheni on the night in question, to which Brown answered in the negative. Thereafter, the state objected, and the trial court prohibited defense counsel from asking additional questions on the subject.

{¶33} "The admission of evidence lies within the broad discretion of a trial court, and a reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that has created material prejudice." *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, at ¶43, citing *State v. Issa* (2001), 93 Ohio St.3d 49, 64.

{¶34} "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶35} This matter lies within the purview of Evid.R. 403(A), which provides:

{¶36} "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."

{¶37} The trial court ruled that this proposed evidence was prejudicial. We agree. In addition, we note that the proposed evidence could confuse the jury, as they could be distracted by what did or did not occur between Brown and Bercheni, instead of focusing on the relevant facts of the attack.

{¶38} Cayson argues that evidence of a sexual relationship between Brown and Bercheni could support his argument that the jury should have been instructed on aggravated assault. We disagree. As mentioned in our prior analysis, that evidence was not sufficient to justify an instruction on aggravated assault. Cayson's second assignment of error is without merit.

{¶39} Cayson's third assignment of error is:

{¶40} "The appellant's convictions are against the manifest weight of the evidence."

{¶41} In determining whether a verdict is against the manifest weight of the evidence, the Supreme Court of Ohio has adopted the following language as a guide:

{¶42} "'The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the

exceptional case in which the evidence weighs heavily against the conviction.'" (Citations omitted.) *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387.

{¶43} Brown testified that Cayson entered her home with a gun, beat and kicked her, allowed the gun to discharge, chased her into the lawn, punched her and knocked her down, forced her into an SUV, knocked her down a second time, and pulled her arm so hard he dislocated her shoulder. In addition, the state introduced medical evidence depicting Brown's injuries. This evidence supports Cayson's convictions.

{¶44} Cayson contends the fact none of the participants called the police discredits Brown's testimony of the severity of the attack. Again, the jury heard Brown's testimony describing the attack. The jury could have determined that there were a variety of reasons the police were not called, including the fear and panic Brown and Bercheni experienced during the situation, which included a gunshot.

{¶45} Cayson argues that the testimony of Bercheni and Brown differed in certain areas, including whether Brown entered the salon area to look out the window. The weight to be given to the evidence and the credibility of witnesses are primarily matters for the jury to decide. Cf. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. As the trier of fact, the jury was in the best position to observe the witnesses' demeanor and evaluate their credibility.

{¶46} The jury did not lose its way or create a manifest miscarriage of justice when it found Cayson guilty of felonious assault, abduction, and having a weapon while under disability. Thus, Cayson's convictions are not against the manifest weight of the evidence.

{¶47} Cayson's third assignment of error is without merit.

{¶48} The judgment of the trial court is affirmed.

WILLIAM M. O'NEILL, J., concurs in judgment only with a Concurring Opinion.

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion,

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WILLIAM M. O'NEILL, J., concurring in judgment only.

{¶49} I concur in judgment only with the majority's decision affirming Cayson's convictions.

{¶50} In *State v. Mack*, the Supreme Court of Ohio conducted an analysis of whether an instruction on aggravated assault was warranted.[1] In *Mack*, the court noted that the "reasonably sufficient" provocation standard was explained in *State v. Shane*.[2] The court observed that the first prong of the standard is an objective one, i.e., whether an ordinary person would be incited or aroused into a sudden passion or fit of rage when presented with the alleged provocation.[3] Next, the focus shifts to the second prong, which is a subjective standard, i.e., "whether the defendant in the particular case 'actually was under the influence of sudden passion or in a sudden fit of rage.'"[4]

{¶51} I disagree with the majority's conclusion regarding the objective prong of the *Mack/Shane* test. Specifically, I do not agree with the majority's blanket assertion that "evidence of two adults engaging in consensual sex is not a serious provocation occasioned by the victim as required for an instruction as to aggravated assault under

1. *State v. Mack* (1998), 82 Ohio St.3d 198, 200.
2. Id. at 201, citing *State v. Shane* (1992), 63 Ohio St.3d 630.
3. Id.
4. *State v. Mack*, 82 Ohio St.3d at 201, quoting *State v. Shane*, 63 Ohio St.3d at 634-635.

R.C. 2903.12(A)." This statement is overly broad. In certain circumstances, finding a lover engaged in apparent sexual relations with another individual could be sufficient to bring on a sudden fit of passion or rage. For example, in *State v. Eldridge*, the trial court instructed the jury on aggravated assault when the defendant found the victim in bed with his girlfriend and proceeded to retrieve a knife and stab the victim.[5] See, also, *State v. Hill*, where the defendant was convicted of aggravated assault and voluntary manslaughter, for an incident when he discovered his girlfriend and another man in bed together and beat them with a baseball bat.[6]

{¶52} The majority cites *State v. Shane* in support of its argument. In *Shane*, the Supreme Court of Ohio held that "mere words" informing the other spouse of infidelity were insufficient to rise to the level of "reasonably sufficient provocation."[7] Such an analysis was appropriate in *State v. Shane*, because the killing in that case occurred after a woman informed her fiancée that she had been unfaithful.[8] Specifically, the court held "[w]e disapprove of a rule which does not allow 'mere words' to be sufficient provocation to reduce murder to manslaughter generally, but which makes a specific exception where the provocation consists of mere words by one spouse informing the other spouse of infidelity."[9] However, the court noted that words are generally not as inflammatory as actions.[10] In addition, the court observed that "discovering a spouse in the *act* of adultery" is a classic example of instructing on voluntary manslaughter in a murder case.[11]

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5. *State v. Eldridge*, 12th Dist. No. CA2002-10-021, 2003-Ohio-7002, at ¶6-15.
6. *State v. Hill* (Nov. 8, 1996), 6th Dist. No. L-95-325, 1996 Ohio App. LEXIS 4849, at *1-2.
7. *State v. Shane*, 63 Ohio St.3d at 637.
8. *State v. Shane*, 63 Ohio St.3d at 630.
9. Id. at 637.
10. Id. at 636.
11. (Emphasis added.) *State v. Shane*, 63 Ohio St.3d at 635.

{¶53} Regarding the subjective prong of the *Mack/Shane* test, I agree that the evidence did not suggest that Cayson was actually in a sudden fit of rage or under the influence of sudden passion. The majority is correct in its conclusion that the facts suggest a preplanned attack, rather than a sudden, unexpected encounter. Perhaps the fact that most deflates Cayson's argument is that he entered the house holding a firearm. This suggests he arrived at Brown's residence expecting a confrontation.

{¶54} The rationale behind the "sufficient provocation" standard is that the defendant acted without an appropriate time to "cool off."[12] Where, as in this case, the evidence suggests the defendant had ample time to "cool off," an aggravated assault instruction is not required.[13] Simply stated, an individual who believes his spouse or girlfriend is being unfaithful may not wait for her to become intimate with another individual, attack one or both of them, and expect to benefit from an aggravated assault instruction. The attack must be contemporaneous with the discovery.

{¶55} Since the second prong of the *Mack/Shane* test was not satisfied by the evidence presented in this matter, Cayson was not entitled to the requested instruction, and his convictions should be affirmed.

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion.

{¶56} I concur in the judgment of this court to affirm Cayson's convictions. Cayson failed to meet the objective prong of the test for whether he was entitled to a

12. *State v. Shane*, 63 Ohio St.3d at 634, fn. 1, quoting 2 LaFave & Scott, Substantive Criminal Law (1986) 255, Section 7.10; see, also, *State v. Watkins* (Mar. 1, 1990), 8th Dist. No. 56522, 1990 Ohio App. LEXIS 761, at *8, citing *State v. Muscatello* (1978), 55 Ohio St.2d 201.
13. *State v. Watkins*, supra, at *8, citing *State v. Muscatello*, supra.

jury instruction on aggravated assault. However, I cannot concur in this court's analysis of the issue. This court's opinion departs from the settled law regarding when a defendant is entitled to a jury instruction on aggravated assault, asserting, as a matter of law, that a confession of adultery "is not reasonably sufficient provocation" to warrant an instruction on the lesser included offense. This position is not tenable under the cases discussing serious provocation and is not necessary to uphold Cayson's convictions. Accordingly, I concur in judgment only.

{¶57} The law is well-settled that, "in a trial for felonious assault, where the defendant presents sufficient evidence of serious provocation, an instruction on aggravated assault must be given to the jury." *State v. Deem* (1988), 40 Ohio St.3d 205, paragraph four to the syllabus. "Provocation, to be serious, must be reasonably sufficient to bring on extreme stress and the provocation must be reasonably sufficient to incite or to arouse the defendant into using deadly force. In determining whether the provocation was reasonably sufficient to incite the defendant into using deadly force, the court must consider the emotional and mental state of the defendant and the conditions and circumstances that surrounded him at the time." Id. at paragraph five of the syllabus.

{¶58} Cayson was not entitled to a jury instruction on aggravated assault because the conditions and circumstances surrounding this assault in this case were not reasonably sufficient to incite Cayson to use deadly force, not because adult consensual sex can never constitute serious provocation. By stating a "bright line" standard as to what may or may not constitute sufficient provocation, this court loses sight of the fact that "the determination of adequate provocation is a fact specific

analysis." *State v. Torres*, 3rd Dist. No. 4-01-06, 2002-Ohio-1203, 2002 Ohio App. LEXIS 1218, at *11.

{¶59} This court relies on the Ohio Supreme Court's decision in *State v. Shane* (1992), 63 Ohio St.3d 630, for the proposition that "a spouse's confession of adultery is not reasonably sufficient provocation to transform a felonious assault into the inferior offense of aggravated assault." *Shane*, however, did not hold that "mere words" or even "confessions of adultery" can never constitute reasonably sufficient provocation. Rather, *Shane* held that "[w]ords alone will not constitute reasonably sufficient provocation to incite the use of deadly force ***in most situations.***" Id. at paragraph two of the syllabus (emphasis added).

{¶60} The rule that *Shane* disapproves of is the rule that makes "a specific exception" for confessions of adultery when considering whether "mere words" constitute sufficient provocation. *Shane* rightly held that the same legal standard should apply to all assertions of mere words as provocation to murder or assault. "[I]n each case, the trial judge must determine whether evidence of reasonably sufficient provocation occasioned by the victim has been presented to warrant a[n] *** instruction [on the lesser offense]. The trial judge is required to decide this issue as a matter of law, ***in view of the specific facts of the individual case.***" Id. at 637 (emphasis added).

{¶61} In *Shane*, the Supreme Court concluded that the "provocation by the victim *** was not reasonably sufficient provocation" based on "the totality of the evidence in this case." Id. at 638. "Shane alleges that it was only mere words that provoked him. Considering this fact, together with the surrounding circumstances of the

case, we conclude that no reasonable jury could have decided that Shane was sufficiently provoked by the victim so that a conviction on the inferior-degree offense *** could have been forthcoming." Id.

{¶62} In the present case, Cayson was not entitled to an instruction on aggravated assault because the alleged provocation was not reasonably sufficient based on the totality of the circumstances, such as the facts that Cayson and the victim were not in a relationship, Cayson did not find the victim with a man, and the victim's alleged provocation was being in her own home wrapped in a towel. These facts, as this court notes, do not raise "the possibility that Cayson's conduct was the result of serious provocation occasioned by [the victim]." This court's analysis need not have gone further.

{¶63} For the foregoing reasons, I concur in judgment only.