[Cite as *State v. Robinson*, 2018-Ohio-2058.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105951

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

STEFON R. ROBINSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-16-610574-A

BEFORE: Celebrezze, J., E.A. Gallagher, A.J., and Stewart, J.

RELEASED AND JOURNALIZED: May 24, 2018

ATTORNEY FOR APPELLANT

Joseph C. Patituce
Patituce & Associates
26777 Lorain Road, Suite 1
North Olmsted, Ohio 44070

ATTORNEYS FOR APPELLEE

Michael C. O'Malley
Cuyahoga County Prosecutor
BY: Daniel A. Cleary
Assistant Prosecuting Attorney
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

FRANK D. CELEBREZZE, JR., J.:

{¶1} Defendant-appellant, Stefon Robinson (hereinafter "Robinson"), brings this appeal challenging his convictions of murder and felonious assault in the death of Chandler Appling (hereinafter "Appling"). Specifically, Robinson argues that the trial court erred when it provided to the jury erroneous written and oral instructions and such error constituted plain error and structural error, that trial counsel was ineffective for failing to object to these erroneous jury instructions, and that Robinson's convictions were against the manifest weight of the evidence. After a thorough review of the record and law, this court affirms.

I. Factual and Procedural History

{¶2} On Saturday, October 8, 2016, Robinson went alone to the Drop Bar located in downtown Cleveland on West 6th Street. At the end of the evening, at approximately 2:00 a.m. Sunday, October 9, 2016, Robinson escorted LaTroya Edwards (hereinafter "Edwards") and two

of Edwards's female acquaintances, to Edwards's vehicle that was parked in a large parking lot located directly across the street from Drop Bar. Although Edwards testified that she knew both Robinson and the victim, Appling, for approximately four years, that she had "hung out" with both of them in the past and knew them "from the neighborhood," Edwards stated that she did not spend any time with either Robinson or Appling while at Drop Bar that evening.

{¶3} Upon leaving Drop Bar and walking across the street, Robinson, Edwards and two of Edwards's female friends encountered Appling. Edwards testified that Appling approached Robinson, a verbal argument ensued between the two men, and Robinson and Appling engaged in a mutual fist fight. Edwards further testified that Appling threw the first punch and at one point, Appling was physically on top of Robinson. Then, Appling got off of Robinson and the two reengaged in a mutual fist fight. This was corroborated by the state's witness, Lawaiyn Coker (hereinafter "Coker"), who knew both Appling and Robinson as well. Coker testified that Robinson and Appling "post(ed) up" (squaring off to fight) and thereafter engaged in a mutual fist fight. At some point after re-engaging, the two men disengaged and Robinson then stabbed Appling in the chest with a knife. Appling died as a result of the single stab wound.

{¶4} Robinson was arrested on October 9, 2016, for the fatal stabbing of Appling. On November 1, 2016, Robinson was indicted on the following charges: aggravated murder, murder, and two counts of felonious assault. The case proceeded to a jury trial on May 24, 2017, and the jury returned verdicts of not guilty as to the aggravated murder charge, and the lesser included murder charge, and verdicts of guilty on the remaining counts. On June 7, 2017, Robinson was sentenced to a prison term of 15 years to life on the murder charge.

{¶5} The state presented several witnesses in its case-in-chief. Testimony presented showed that there were hundreds of people within the immediate area of the fight as several bars

on West 6th Street were closing and patrons were exiting all the bars at this time. Further, uniform police officers, working off-duty security details, were stationed at these bars as well. Cleveland Police Department Sergeant Kenneth Allen (hereinafter "Sgt. Allen") was working an off-duty shift, assigned to work crowd control on the front patio area of Drop Bar, which was within the immediate area of the fight between Robinson and Appling. Sgt. Allen specifically testified that he heard someone scream loudly and that this scream caught his attention. Sgt. Allen testified that he saw Robinson walk towards Appling and that Robinson appeared to punch Appling twice in the stomach area. Then, Sgt. Allen observed Robinson walk away directly towards Sgt. Allen, when Robinson got within five feet of Sgt. Allen, he observed a knife in Robinson's hand, and then Robinson took off running. Robinson was eventually apprehended and arrested after a foot chase with additional off-duty police officers who were also working security detail at the other surrounding bars.

{¶6} Robinson now appeals his convictions arguing the following four assignments of error:

> I. The erroneous instructions given in writing and orally to the jury constituted structural error.
>
> II. Trial counsel was ineffective for failing to object to the erroneous self-defense instructions recited to the jury.
>
> III. The erroneous instructions given in writing and orally to the jury constituted plain error.
>
> IV. Appellant's conviction was against the manifest weight of the evidence.

II. Law and Analysis

A. Structural Error and Plain Error

{¶7} In his first and third assignments of error, Robinson argues the trial court committed structural error and plain error when it gave erroneous oral and written jury instructions regarding self-defense. As these two assignments of error constitute the same issue, we address them together.

{¶8} Structural errors are constitutional errors that "defy analysis by 'harmless-error' standards" because they "affect the framework in which the trial proceeds," rather than just being error in the trial process itself. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006). "A structural error permeates the entire conduct of a trial so that the trial cannot reliably serve its function as a means for determining guilt or innocence." *State v. Brabson*, 8th Dist. Cuyahoga No. 100969, 2014-Ohio-5277, ¶ 25, citing *Arizona v. Fulminante*, 499 U.S. 279, 309-310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991).

{¶9} A structural error mandates a finding of "per se prejudice" and results in "automatic reversal." *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, ¶ 20, *overruled on other grounds*, *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26, ¶ 45. Although all structural errors are by nature constitutional errors, not all constitutional errors are structural. As a result, some constitutional errors can be deemed nonprejudicial so long as the error is harmless beyond a reasonable doubt. *Brabson* at ¶ 26, citing *State v. Payne*, 114 Ohio St.3d 502, 505, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 18. Indeed, it is the rarest of cases that an error is held to be structural, thus requiring an automatic reversal. *Washington v. Recuenco*, 548 U.S. 212, 218, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006).

{¶10} In the present matter, the trial court charged the jury, in relevant part, as follows:

> When it comes to the affirmative defense, the duty then shifts to the defendant and the burden of going forward with the evidence of self defense, against the danger of death or great bodily harm, and the burden of proving this affirmative defense

> rests upon the defendant. He must establish such defense by a preponderance of the evidence.

(Tr. 490-491.)

> If the weight of the evidence is equally balanced or if you are unable to determine which side of an affirmative defense as to preponderance, then the defendant has not established such affirmative defense * * * [t]he defendant claims to have acted in self defense. To establish the claim of self defense, the defendant must prove that * * *.

(Tr. 492.)

> Also, he must establish by the preponderance of the evidence that he had not violated any duty to retreat, escape, withdraw, or to avoid danger.
>
> The defendant had a duty to retreat if the defendant was at fault in creating the situation.

(Tr. 493.)

> If the defendant fails to establish the defense of self defense against danger of great bodily harm or death, the State must still prove to you beyond a reasonable doubt only the essential elements of the crime as charged in the indictment in order for you to find the defendant guilty of that offense.
>
> If you find that the State proved beyond a reasonable doubt all of the essential elements *of the offense of self defense* against danger of great bodily harm or death and if you further find that the defendant failed to prove by a preponderance of the evidence the defense of self defense, your verdict must be guilty.
>
> If you find that the State failed to prove beyond a reasonable doubt any one of the essential elements *of the offense of self defense* against danger of death or great bodily harm, or if you find that the defendant proved by a preponderance of the evidence the defense of self defense, then you must find the defendant not guilty. So we talked about the murder count. We talked about the affirmative defenses that he defendant is raising to all of the counts in this indictment.

(Emphasis added.) (Tr. 495-496.)

{¶11} However, Robinson did not object to the jury instructions and, therefore, he has forfeited all but plain error. *Payne* at ¶ 23; Crim.R. 52(B). "A forfeited error is not reversible

error unless it affected the outcome of the proceedings and reversal is necessary to correct a manifest miscarriage of justice." *State v. Amison*, 8th Dist. Cuyahoga No. 104728, 2017-Ohio-8226, ¶ 4. Under Crim.R. 52(B), "[p]lain error does not exist unless, but for the error, the outcome at trial would have been different." *State v. Joseph*, 73 Ohio St.3d 450, 455, 653 N.E.2d 285 (1995), citing *State v. Moreland*, 50 Ohio St.3d 58, 552 N.E.2d 894 (1990).

{¶12} Based on our review of the entirety of the jury instructions, we find that the trial court's jury instructions sufficiently mirrored the language contained within O.J.I. CR 521.19, 417.27 and 417.29. Plain error does not exist because, even without a verbatim recitation of the language contained in R.C. 2923.02(A) and O.J.I. CR 523.02, the jury was properly instructed as to the issue of self-defense. *See State v. Cooperrider*, 4 Ohio St.3d 226, 227, 448 N.E.2d 452 (1983), citing *State v. Long*, 53 Ohio St.2d 91, 97, 372 N.E.2d 804 (1978) (where giving an incorrect jury instruction did not constitute plain error or defect under Crim.R. 52(B)).

{¶13} In the present matter, the trial court provided the correct self-defense instruction. However, at the conclusion of this instruction, the trial court incorrectly stated, on two occasions, the "offense of self-defense." Such an error is not dissimilar to the error in *State v. Becker*, 8th Dist. Cuyahoga No. 100524, 2014-Ohio-4565. In *Becker*, the trial court provided the following instruction:

> If you find that the defendant failed to prove beyond a reasonable doubt any one of the essential elements of the offense of unlawful sexual conduct with a minor as charged in Count One of the indictment, then your verdict must be not guilty according to your findings.

Id. at ¶ 60. This court in *Becker* stated that

> substituting on one occasion the word "defendant" in place of the state of Ohio during its instructions to the jury was not plain error because a review of the complete jury instructions clearly demonstrated that the trial court properly

> identified the necessary parties and provided the jury with adequate instructions to allow the jury to correctly determine the defendant's guilt.

Id., citing *State v. Foldes*, 8th Dist. Cuyahoga No. 57791, 1990 Ohio App. LEXIS 4630, 23 (Oct. 25, 1990).

{¶14} In the present matter, throughout the trial proceedings, it was stated to the jury that the state bore the burden of proof as to the elements of the offenses and that the defendant bore the burden of proof with regards to the issue of self-defense. Further, defense counsel stated that he bore the burden of proof in his opening statement[1] and closing argument.[2] Thus, a review of the record reveals that the error was an isolated error. *See Becker*. Accordingly, in considering the entirety of the proceedings, including defense counsel's remarks in his opening statement and closing argument, we find that the trial court's jury instructions were proper and Robinson was not prejudiced.

{¶15} Robinson's first and third assignments of error are overruled.

B. Ineffective Assistance of Counsel

{¶16} In his second assignment of error, Robinson claims his attorney was ineffective for failing to properly object to the jury instructions given by the trial court. This court reviews alleged instances of ineffective assistance of counsel under the test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to establish a claim of ineffective assistance of counsel, an appellant must prove (1) counsel's performance fell

---

[1] "We will be — and I'm anticipating we're going to have an instruction of self defense here, and that is going to require that the defense prove by a preponderance of the evidence the greater weight of the evidence that [Robinson] did not start this fight; that [Robinson] had a reasonable belief, even if it was mistaken, that he was in imminent fear of great bodily harm and that he used that much force that he felt was necessary, even if mistaken, to repel that attack; and that under the circumstances, he had no duty to retreat." (Tr. 233.)

[2] "If you find by the greater weight of the evidence that my client has sustained his burden of self defense, then he needs to be acquitted." (Tr. 537.)

below an objective standard of reasonable representation, and (2) he was prejudiced by that deficient performance. *Id.* at 687-688. In Ohio, every properly licensed attorney is presumed to be competent and, thus, a defendant claiming ineffective assistance of counsel bears the burden of proof. *State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985).

{¶17} In determining whether a defendant has been denied the effective assistance of counsel, the test is "whether the accused, under all the circumstances, had a fair trial and substantial justice was done." *State v. Hester*, 45 Ohio St.2d 71, 341 N.E.2d 304 (1976), paragraph four of the syllabus. Moreover, prejudice is established when a defendant demonstrates "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland* at 694.

{¶18} Based on our resolution of Robinson's first and third assignments of error discussed above, we cannot say that counsel provided ineffective assistance by failing to object to two isolated errors within the jury instructions. Having found that the jury instructions were not improper, we cannot say that counsel's failure to object prejudiced Robinson. Further, since we find no error in the jury instructions, any objection thereto would have been trivial. As such, Robinson has failed to demonstrate that the performance of his trial counsel was deficient and that he was prejudiced.

{¶19} Robinson's second assignment of error is overruled.

C. Manifest Weight

{¶20} In his fourth assignment of error, Robinson argues that his convictions are against the manifest weight of the evidence.

{¶21} A manifest weight challenge questions whether the state met its burden of persuasion. *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 12. A reviewing court "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." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). A conviction should be reversed as against the manifest weight of the evidence only in the most "exceptional case in which the evidence weighs heavily against the conviction." *Id.*

{¶22} Although we review credibility when considering the manifest weight of the evidence, we are conscious of the fact that determinations regarding the credibility of witnesses and the weight of the testimony are primarily for the trier of fact. *State v. Bradley*, 8th Dist. Cuyahoga No. 97333, 2012-Ohio-2765, ¶ 14, citing *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967). Undeniably, the trier of fact is best able "to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 24. Here, the jury may take note of any inconsistencies and resolve them accordingly, "believ[ing] all, part, or none of a witness's testimony." *State v. Raver*, 10th Dist. Franklin No. 02AP-604, 2003-Ohio-958, ¶ 21, citing *State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964).

{¶23} In support of his manifest weight challenge, Robinson argues that there existed sufficient evidence that he was acting in self-defense when he stabbed Appling in the chest. Robinson states that Edwards's testimony demonstrated that Robinson was the victim of a

shooting approximately one year ago, having been shot thirteen times and as such, Robinson carried a knife for his protection.

{¶24} Self-defense is an affirmative defense and, thus, the accused has the burden to prove it by a preponderance of the evidence. *State v. Tabasso*, 8th Dist. Cuyahoga No. 98248, 2012-Ohio-5747, ¶ 21, citing *State v. Smith*, 10th Dist. Franklin No. 04AP-189, 2004-Ohio-6608, ¶ 16. To establish self-defense through the use of deadly force, defendants must prove (1) they were not at fault in creating the situation giving rise to the affray, (2) they had a bona fide belief that they were in imminent danger of death or great bodily harm and their only means of escape from such danger was the use of such force, and (3) they must not have violated any duty to retreat or avoid the danger. *State v. Owens*, 8th Dist. Cuyahoga No. 98165, 2012-Ohio-5887, ¶ 12, citing *State v. Williford*, 49 Ohio St.3d 247, 551 N.E.2d 1279 (1990). Further, the elements of self-defense are cumulative and, if a defendant failed to prove any one of the elements by a preponderance of the evidence, he or she failed to demonstrate that he or she acted in self-defense. *Id.*

{¶25} In our review of the record, it is unclear whether Robinson was at fault in creating the situation giving rise to the affray. The record shows that as he was crossing West 6th Street, Appling approached him and the two men began to argue. Robinson and Appling then began to "post up" (squaring off to fight) and thereafter engaged in mutual fist fight. Both Coker, who testified on behalf of the state, and Edwards, who testified on behalf of Robinson, stated that Appling and Robinson engaged in a mutual fist fight. Thus, it appears from our review of the record, that Robinson could have continued on his original course with Edwards and her two friends. By engaging in a mutual fist fight, both Robinson and Appling were at fault in creating

the affray and as the self-defense factors are cumulative, Robinson failed to demonstrate that he acted in self-defense.

{¶26} Assuming, arguendo, that Robinson could demonstrate that he was not at fault in creating the affray, our review of the record shows that there was limited evidence demonstrating Robinson's bona fide belief that he was in imminent danger of death or great bodily harm. Indeed, the only evidence of Robinson's bona fide belief was elicited through Edwards. It should be noted that Robinson did not testify in this matter. It is difficult to review the record to determine whether Robinson himself had a bona fide belief that he was in imminent risk of serious physical harm without such testimony. At trial, the only evidence of Robinson's subjective bona fide belief, was the following exchange between defense counsel and Edwards:

> Q. Do you know within the last couple of years whether or not [Robinson] sustained some very serious injuries?
> A. Yes.
> Q. Tell us about that. What do you know?
> A. I now that he was shot 13 times.
> Q. Thirteen, you said?
> A. Yes, I think that's — just about.
> Q. Do you know if he was hospitalized?
> A. Yes.
> Q. Do you know how long?
> A. No.

(Tr. 446-447.) Indeed, it appears from our review of the record that this testimony from Edwards demonstrated that Robinson had previously sustained serious injuries, i.e. gunshot wounds.

{¶27} Further, as Sgt. Allen's testimony demonstrated, Robinson approached Appling and re-engaged the fight. Sgt. Allen stated that:

> I saw a black male [Appling], heavier set, standing on the east side of West 6th about 15 feet from the curb. He turns around and looks over towards the bar and at that point there's another black male [Robinson] who is walking across the

> street towards him [Appling]. The heavier set black male raises his hands like he was trying to say, hey, what's going on? I couldn't hear what he said. The male that approached him walked up towards him, [Robinson] appeared to punch him or hit him or tried to hit him twice in the stomach area.

(Tr. 405.) Our review of the record indicates that Robinson reengaged Appling, thus demonstrating that he was not in fear of imminent danger of death or great bodily harm. We are unable to conclude that the jury lost its way in rejecting Robinson's bona fide belief that he was in imminent danger of death or great bodily harm, as elicited through Edwards. Perhaps Robinson's own testimony could have established this bona fide belief. As such, there is no basis in the record for Robinson to argue that he was in fear of imminent harm at the time he and Appling were engaged in the fight.

{¶28} Lastly, addressing the third prong of Robinson's self-defense argument, the testimony presented at trial reasonably established that Robinson had other means of escape besides the use of deadly force, particularly when he and Appling were disengaged from one another. "[I]n most circumstances, a person may not kill in self-defense if he has available a reasonable means of retreat from the confrontation." *Williford*, 49 Ohio St.3d at 250, 551 N.E.2d 1279. Here, there existed a reasonable means of retreat from the confrontation as evidenced by the fact that Robinson fled the scene on foot as he attempted to evade police officers. In our view, the jury reasonably determined that the death of Appling was not created by Robinson's inability to escape without using deadly force. Thus, the record contains credible evidence that Robinson had the means to safely retreat once he and Appling were disengaged from one another.

{¶29} After a careful consideration of the record in its entirety, it is evident that the jury gave very little weight to the testimony of Edwards as it pertained to the circumstances that gave

rise to the altercation between Appling and Robinson. The jury had sufficient information to judge Edwards's credibility. The jury heard Edwards's testimony that she knew both Robinson and Appling for approximately four years, that she "hung out" with both of them and knew them both "from the neighborhood." The jury was in the best position to view all of the witnesses, including Edwards, and observe their demeanor, gestures, and voice inflections that are critical observations in determining a witness's credibility. *State v. Clark*, 8th Dist. Cuyahoga No. 94050, 2010-Ohio-4354, ¶ 17, citing *State v. Hill*, 75 Ohio St.3d 195, 205, 661 N.E.2d 1068 (1996), and *Antill*, 176 Ohio St. at 66, 197 N.E.2d 548. Furthermore, the jury had sufficient information to judge each witness's credibility and "was free to believe all, part, or none of the testimony of each witness." *State v. Colvin*, 10th Dist. Franklin No. 04AP-421, 2005-Ohio-1448, ¶ 34; *State v. Smith*, 8th Dist. Cuyahoga No. 93593, 2010-Ohio-4006, ¶ 16. We cannot conclude that this record presents a scenario where the trier of fact clearly lost its way in rejecting Robinson's claim of self-defense. Accordingly, Robinson's convictions are not against the manifest weight of the evidence.

{¶30} Robinson's fourth assignment of error is overruled.

III. Conclusion

{¶31} After thoroughly reviewing the record, we find that the jury instructions provided did not constitute structural error or plain error; trial counsel was not ineffective for failing to object to the self-defense instructions; and Robinson's convictions were not against the manifest weight of the evidence.

{¶32} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's convictions having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

FRANK D. CELEBREZZE, JR., JUDGE

EILEEN A. GALLAGHER, A.J., and
MELODY J. STEWART, J., CONCUR