[Cite as *State v. McLaughlin*, 2010-Ohio-1228.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 09AP-836
v.	:	(C.P.C. No. 08CR08-7022)
Norman J. McLaughlin,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 25, 2010

Ron O'Brien, Prosecuting Attorney, and *Kimberly Bond*, for appellee.

W. Joseph Edwards, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Defendant-appellant, Norman J. McLaughlin ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas following a jury verdict convicting him of one count of felonious assault with a firearm specification, in violation of R.C. 2903.11, a felony of the second degree.

{¶2} Appellant advances a single assignment of error, as follows:

> THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL BY FAILING TO PERMIT THE DEFENSE TO INTRODUCE RELAVENT [SIC] EVIDENCE CONTRA THE DUE PROCESS CLAUSES OF THE OHIO AND FEDERAL CONSTITUTIONS.

{¶3} On September 4, 2008, appellant shot Jermayne Crowell ("the victim") in front of appellant's residence in Columbus, Ohio. On September 23, 2009, the Franklin County Grand Jury indicted appellant on one count of attempted murder and one count of felonious assault, both with firearm specifications. The case was tried to a jury on June 2 through 8, 2009, following which the jury found appellant guilty of felonious assault, but could not reach a verdict on the charge of attempted murder.

{¶4} The following facts were adduced at the trial. At the time of the shooting, appellant was dating and residing with Tanya Palmer ("Palmer") at a home on Middlehurst Drive in Columbus. Palmer and the victim, who had dated years ago, had two children together, and both of the children lived with Palmer and appellant. On September 4, 2008, Palmer's and the victim's 10-year-old daughter telephoned the victim because she was upset over a fight she had had with her mother. As a result of the telephone call, the victim planned to pick up his daughter at Palmer's and appellant's house. He attempted to contact Palmer, but was unable to reach her.

{¶5} The victim arrived at appellant's house along with his girlfriend and his mother, and parked on the street. The front door of the residence was open and the victim saw children inside playing video games. As the victim approached the residence, Palmer appeared at the front door. He asked her about their daughter, whereupon Palmer slammed the front door. This made the victim angry and, as he walked past the front window of the residence, he struck it, causing it to shatter. When his mother heard

the glass break, she called him back to the car. As the victim was making his way back toward his car, appellant came out of his residence. The two men exchanged words, and according to the victim, appellant said, "didn't I tell you I was going to kill you?" According to the victim's mother, appellant said, "mother fucker, I am going to kill you." Appellant pointed a gun at the victim and began firing, shooting him three to four times, including once in the chest. Appellant then began hitting and kicking the victim, until appellant's cousin, who did not witness the shooting, came out of the house, intervened, and took the gun from appellant.

{¶6} According to a neighbor who witnessed the shooting, the victim did not have a weapon in his hands during the incident. Palmer testified that she was looking at the damaged front window when she heard the gunshots, whereupon she looked outside and saw appellant and the victim "tussling" in the yard near the street and then she saw appellant standing over the victim with a gun.

{¶7} The victim was eventually taken to the hospital and recovered from his injuries. Appellant fled the scene after the shooting and later turned himself in to police. At trial, appellant claimed he had acted in self-defense. According to appellant, he retrieved his gun when he heard the sound of glass breaking. He stated that he kept the gun loaded for protection. It was cocked and ready to fire when he opened the front door. He exited his residence and approached the victim, who he met on the front porch steps. He testified that he left his residence because he was in fear for his life and wanted to protect his family and his home. Appellant denied that he verbally threatened to kill the victim. He stated that he and the victim began to fight and the victim punched appellant in the face and pulled appellant off of the porch. Appellant claimed that the victim then

reached for something at his waist, which led appellant to believe the victim had some type of weapon. At this point, appellant fired his gun at the victim and kept firing because he did not know if he had hit him with any bullets. Appellant then struck the victim with the gun because, appellant testified, the victim tried to grab the gun. Appellant's cousin eventually pulled appellant off of the victim.

{¶8} Appellant wanted to testify that he was fearful of the victim because the victim had made two prior threats to kill appellant. Specifically, appellant proffered that if permitted, he would testify to two specific threats that the victim had made against him. First, about one year prior to the shooting, the victim had entered a fast-food restaurant where appellant was working and threatened to kill appellant. Second, at some unspecified time prior to the shooting incident, the victim had shown a gun to Palmer and told her that the gun was for appellant if appellant ever picked up the victim's children from school. According to appellant, he would have testified that Palmer related this incident to him before the shooting.

{¶9} Appellant argued that these threats contributed to his belief, at the time of the shooting, that he was in imminent danger of bodily harm. Plaintiff-appellee, the state of Ohio ("the state"), argued that this testimony was irrelevant to appellant's claim of self-defense because it was not sufficiently recent to have affected appellant's state of mind at the time of the shooting. The trial court ruled that the testimony was inadmissible because the threats to which appellant wished to testify did not occur immediately prior to the confrontation between appellant and the victim. (Tr. 82-83.)

{¶10} On appeal, appellant argues that the trial court erred in refusing to allow him to testify regarding the victim's previous threats against him. " 'A trial court has broad

discretion in the admission or exclusion of evidence, and its judgment will not be reversed absent a clear showing of an abuse of discretion with attendant material prejudice to the defendant.' " *State v. Holloman*, 10th Dist. No. 06AP-01, 2007-Ohio-840, ¶28, quoting *State v. Rowe* (1993), 92 Ohio App.3d 652, 665. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. When applying the 'abuse of discretion' standard, an appellate court is not free to merely substitute its judgment for that of the trial court." (Citations omitted.) Id. at ¶29.

{¶11} In order to establish the affirmative defense of self-defense, a defendant must prove: "(1) [he] was not at fault in creating the situation giving rise to the affray; (2) [he] had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force; and (3) [he] must not have violated any duty to retreat or avoid the danger." *State v. Robbins* (1979), 58 Ohio St.2d 74, paragraph two of the syllabus. Crucial to this defense is the defendant's state of mind. *State v. Koss* (1990), 49 Ohio St.3d 213, 215.

{¶12} "Courts have consistently held that a defendant arguing self-defense may testify about his knowledge of specific instances of the victim's prior conduct in order to establish the defendant's state of mind at the time of the incident." *State v. Baker* (1993), 88 Ohio App.3d 204, 208. "Although a defendant may not establish self-defense by proving particular instances of violence on the part of the victim which did not concern the defendant and of which the defendant had no personal knowledge, a defendant may introduce proof of the victim's threats against him in order to establish his belief that he

was in danger at the time of the killing." *State v. Randle* (1980), 69 Ohio App.2d 71, syllabus; see also *State v. Fisher* (Mar. 12, 1996), 10th Dist. No. 95APA04-437.

{¶13} In the instant case, the trial court refused to allow appellant to testify about two threats that the victim had previously made against him, even though appellant proffered that he had been aware of the threats prior to the shooting incident. Review of the transcript reveals that the court appeared to believe that the threats occurred too remotely in time to have affected appellant's belief that he was in danger. The state argues that this was correct and that, with respect to the threat communicated through Palmer, the fact that appellant did not proffer when he learned of the threat or when it was made, rendered it inadmissible.

{¶14} However, the applicable case law places no such temporal limitation upon evidence of victim threats; the requirements are that they must have occurred, and the defendant must have been aware of them prior to the incident at issue. " 'It has been laid down as a general rule that threats of a [victim] against the accused are not admissible in evidence unless such threats were communicated to the accused *before* the [confrontation between the accused and the victim].' " (Emphasis added.) *State v. Berger*, 8th Dist. No. 87603, 2006-Ohio-6583, ¶10, quoting *State v. Debo* (1966), 8 Ohio App.2d 325, 327-28; see also *Randle*; *State v. Busby* (Sept. 14, 1999), 10th Dist. No. 98AP-1050 ("[T]he critical issue is what the defendant knew about the alleged victim at the time of the confrontation. For that purpose, a defendant is permitted to testify about specific incidents of the alleged victim's violent behavior if the defendant was aware of them *at the time of the confrontation*." (Emphasis added.)).

{¶15} The record reveals that appellant proffered that the victim threatened him on two separate occasions prior to the shooting, once with reference to a gun, and that appellant was aware of both threats at the time of the shooting. This evidence was relevant to appellant's state of mind at the time of the incident. As such, the trial court erred when it refused to allow appellant's testimony as to these two threats.

{¶16} Although we conclude that the trial court erred, we find the error was not materially prejudicial because even with this testimony, the evidence of self-defense was insufficient and the result would not have been different. Crim.R. 52(A) ("Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded."). As noted earlier, in order to prove self-defense, appellant had to prove by a preponderance of the evidence that (1) he was not at fault in creating the situation giving rise to the affray; (2) he had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of deadly force; and (3) he did not violate any duty to retreat or avoid the danger.

{¶17} While the erroneously excluded evidence does bear upon the bona fide belief element, there is no evidence from which the jury could infer that appellant's only means of escape from the "danger" that the victim posed was the use of deadly force. There is likewise no evidence from which the jury could reasonably infer that appellant attempted to retreat or avoid the danger. Appellant left the safety of his home, from which he could have summoned police, and pursued the unarmed victim as the victim was departing the home. Because appellant could not establish the third element of his self-defense claim, or part of the second element, the trial court's error in excluding evidence relevant to appellant's bona fide belief is harmless beyond a reasonable doubt.

{¶18} For this reason, we overrule appellant's assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK, P.J., and McGRATH, J., concur.

_____