[Cite as *State v. Collier*, 2010-Ohio-1819.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-182 (C.P.C. No. 08CR-03-2164)
Roger G. Collier,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on April 27, 2010

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

W. Joseph Edwards, for appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Defendant-appellant, Roger G. Collier ("appellant"), was indicted on one count of felonious assault in violation of R.C. 2903.11, a felony of the second degree. After a jury trial, appellant was found guilty of the charge and sentenced to a definite term of six years. Appellant filed a timely notice of appeal, and raised the following assignment of error:

> THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT FAILED TO INSTRUCT ON THE INFERIOR DEGREE OFFENSE OF AGGRAVATED ASSAULT THEREBY VIOLATING DEFENDANT-APPELLANT'S

RIGHTS UNDER THE OHIO AND UNITED STATES CONSTITUTIONS.

{¶2} At the trial, the testimony provided that the charge arose from the following incident. During the late hours of March 16, 2008, Michael DeLeon went to the VIP Lounge in Hilliard and met his brother, Josh, and a friend, Aaron Malinowski. He arrived at approximately 10:30 p.m. They sat at the bar and he drank approximately three beers during the evening. Appellant arrived at the bar with his wife, Monica, approximately at midnight. DeLeon and appellant are cousins and lived together from the time appellant was 12 until 2006. Appellant told DeLeon that he had gotten married and DeLeon asked him why he had not been invited to the wedding. DeLeon testified there was no argument. (Tr. 90.)

{¶3} DeLeon stated that at closing time, he left with Malinowski and, as he was walking to his car, appellant walked up and started "trash talking." (Tr. 92.) DeLeon stated that appellant was yelling about Monica saying DeLeon was actually the father of her baby, not appellant. Appellant threatened to stab DeLeon, pulled out a knife, and took a step towards him. DeLeon felt threatened so he hit appellant in the jaw. Appellant stabbed him twice. DeLeon stated he did not have a weapon or anything in his hands.

{¶4} Malinowski also testified that he met DeLeon and Josh at the VIP Lounge at approximately 11:00 p.m. Appellant arrived at the bar and told them he was married. Malinowski heard talk between DeLeon and appellant about DeLeon being the father of Monica's child. But appellant was happy when he arrived and Malinowski did not notice a mood change. Appellant left approximately 20-30 minutes before DeLeon left and Malinowski left a few minutes after DeLeon. Malinowski testified he was standing by the

bar door and saw appellant and DeLeon talking in the parking lot, but both seemed angry. Malinowski saw things start to escalate, so he started to run out there, but DeLeon walked by him, holding his side and said he had been stabbed. (Tr. 135.)

{¶5} Malinowski did not see DeLeon get stabbed but did see appellant with a knife in his hand. (Tr. 136.) He grabbed appellant and started hitting him after DeLeon was stabbed.

{¶6} Several Hilliard police officers testified that they responded to a call at approximately 2:30 a.m. on March 17, 2008 at the VIP Lounge. The victim was found leaning against a window and identified appellant as the assailant just before going into shock. (Tr. 65.) The officers found Monica in the women's restroom of the bar washing her hands and found paper towels with blood on them in the toilet. They took two knifes from Monica. A third knife was found in a vehicle that was searched later in the day. Appellant was arrested a little while after the incident. (Tr. 156.)

{¶7} The last witness for the prosecution was Matthew Hazlett. He arrived at the VIP Lounge at approximately 11:00 p.m. that evening. He stayed until closing. He and his aunt were leaving and saw appellant arguing with DeLeon and Malinowski. Hazlett saw appellant pull a knife and stab DeLeon. (Tr. 165.) Hazlett believes appellant stabbed DeLeon twice. At that time, Hazlett grabbed DeLeon and pulled him back and Malinowski started fighting appellant. Hazlett testified there was nothing in DeLeon's hands. Appellant drove away and Hazlett called 9-1-1. Hazlett testified he had seen an altercation in the bar and appellant had been kicked out of the bar but there were approximately 45-60 minutes between the time appellant left and the time DeLeon and Malinowski left the bar.

{¶8} Finally, appellant testified in his own defense. He stated he worked until 11:00 that evening and then he and his wife went to another bar before arriving at the VIP Lounge. He saw DeLeon coming out of the bar as he was entering and DeLeon said to him, "that's kind of fucked up that I didn't get - - that he wasn't invited to the wedding. He also said that I had to answer to the rest of the family, and including his brothers, Aaron." (Tr. 181.) Appellant stated he kept going inside the bar but the bartender asked him to leave. Appellant specifically stated there was no fight. He walked over to a nearby pool hall but it was closing so he went back to the VIP parking lot to leave and DeLeon and Malinowski called him over. They then started hitting him, he was pinned against a vehicle and he felt very threatened. (Tr. 185.) He testified he "was kind of scared there for a minute." (Tr. 186.) He did not think they would stop and he could not get away. He ended up "sticking the victim, Michael DeLeon, out of defense." (Tr. 187.) Then Malinowski told him to get in his car and leave. Appellant testified he had no idea about the talk concerning DeLeon being the father of his baby, in fact, he stated that the first time he heard that was in court. (Tr. 190.)

{¶9} By his assignment of error, appellant contends that the trial court erred in failing to instruct the jury on the inferior degree offense of aggravated assault thereby violating his rights under the Ohio and United States Constitutions. A trial court should only instruct the jury regarding the facts in issue that the evidence tends to establish. *Murphy v. Carrollton Mfg. Co*. (1991), 61 Ohio St.3d 585, 591. A trial court's failure to give a requested instruction shall not be overturned absent an abuse of discretion. *State v. Wolons* (1997), 44 Ohio St.3d 64, 68. An abuse of discretion connotes more

than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶10} R.C. 2903.11 defined felonious assault, as effective at the time, in pertinent part, as follows:

> (A) No person shall knowingly do either of the following:
>
> (1) Cause serious physical harm to another * * *;
>
> (2) Cause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance.

{¶11} R.C. 2903.12 defined aggravated assault, as effective at the time, in pertinent part, as follows:

> (A) No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly:
>
> (1) Cause serious physical harm to another * * *;
>
> (2) Cause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code.

{¶12} Thus, both offenses involve knowingly causing physical harm to another by means of a deadly weapon. *State v. Keeton* (1998), 2d Dist. No. 98 CA 13. However, aggravated assault provides for a lesser sentence where the defendant commits the offense while under the influence of sudden passion or in a sudden fit of rage which is brought on by serious provocation by the victim that is reasonably sufficient to incite the person into using deadly force.

{¶13} In *State v. Deem* (1988), 40 Ohio St.3d 205, the issue before the Supreme Court of Ohio was whether a defendant, who was indicted on felonious assault was

entitled to a jury instruction on aggravated assault. The court determined that as statutorily defined, the offense of aggravated assault is an inferior degree of felonious assault since its elements are identical to those of felonious assault, except for the additional mitigating element of serious provocation. Id. at 210-11. Thus, the court concluded in a trial for felonious assault, where the defendant presents sufficient evidence of serious provocation, such that a jury could both reasonably acquit the defendant of felonious assault and convict the defendant of aggravated assault, an instruction on aggravated assault must be given. Id. at 211.

{¶14} In *State v. Shane* (1992), 63 Ohio St.3d 630, the Supreme Court of Ohio defined "reasonably sufficient" provocation within the context of voluntary manslaughter. The court determined that an objective standard must first be applied to determine whether the alleged provocation is reasonably sufficient to bring on a sudden passion or fit of rage, or the provocation must be "sufficient to arouse the passions of an ordinary person beyond the power of his or her control." Id. at 635. If that objective standard is met, the inquiry then shifts to a subjective standard, to determine whether the defendant in the particular case acted under the influence of sudden passion or in a sudden fit of rage. Id. at 634-35.

{¶15} Appellant contends that the discussion or argument concerning the paternity of Monica and appellant's baby coupled with the early morning hours and drinking was sufficient to escalate emotions and conflict. However, words alone will not constitute reasonably sufficient provocation to incite the use of deadly force in most situations. Id. at paragraph two of the syllabus. Also, "past incidents or verbal threats do not satisfy the test for reasonably sufficient provocation when there is sufficient time

for cooling off." *State v. Mack*, 82 Ohio St.3d 198, 201, 1998-Ohio-375, citing *State v. Huertas* (1990), 51 Ohio St.3d 22, 31-32. Everyone who testified, including appellant, stated there was at least 30 minutes between the times appellant left the VIP Lounge and the time DeLeon and Malinowski left the VIP Lounge. That was a sufficient cooling off period from any argument that may have occurred inside the VIP Lounge. Moreover, appellant testified that he had not heard any discussion about the paternity of the baby before the trial. (Tr. 190.) He cannot now claim that such argument was the cause for provocation for sudden passion or sudden fit of rage.

{¶16} Further, appellant claims that he was attacked by DeLeon and Malinowski in the parking lot, they hit him, he was pinned against a vehicle and he felt very threatened. (Tr. 185.) He testified he "was kind of scared there for a minute." (Tr. 186.) He thought they would not stop and he could not get away. He ended up "sticking the victim, Michael DeLeon, out of defense." (Tr. 187.) "Fear alone is insufficient to demonstrate the kind of emotional state necessary to constitute sudden passion or fit of rage." *Mack* at 201.

{¶17} This court has held that a defendant's testimony regarding his fear in a situation does not constitute serious provocation necessary for a jury instruction. See *State v. Madden*, 10th Dist. No. 05AP-149, 2006-Ohio-4224. See also, *State v. Lee,* 10th Dist. No. 04AP-234, 2004-Ohio-6834; *State v. Collins* (1994), 97 Ohio App.3d 438, where the court found the defendant's testimony concerning acting in self-defense did not support serious provocation; *State v. Caldwell* (Dec. 17, 1998), 10th Dist. No. 98AP-165, where the court concluded the defendant acted out of fear rather than rage. The trial court did not err in refusing to instruct the jury on voluntary manslaughter. In this

case, there is no evidence of any serious provocation that would arouse the passions of an ordinary person beyond his or her control.

{¶18} Thus, appellant has failed to meet the objective standard of *Shane* in order to demonstrate reasonably sufficient provocation and the trial court did not err in refusing to give an instruction on aggravated assault because the evidence did not warrant such an instruction. Appellant's assignment of error is overruled.

{¶19} For the foregoing reasons, appellant's assignment of error is overruled and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

KLATT and McGRATH, JJ., concur.

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