[Cite as *State v. Ellis*, 2012-Ohio-3586.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 11AP-939
v.	:	(C.P.C. No. 10CR-11-6433)
Barnell E. Ellis,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 9, 2012

Ron O'Brien, Prosecuting Attorney, and *Michael P. Walton*, for appellee.

Yeura R. Venters, Public Defender, and *John W. Keeling*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶ 1} Barnell E. Ellis, defendant-appellant, appeals the judgment of the Franklin County Court of Common Pleas, in which the court found him guilty, pursuant to a bench trial, of carrying a concealed weapon which is a violation of R.C. 2923.12 and a fourth-degree felony, and guilty, pursuant to a jury verdict, of murder with gun specification which is a violation of R.C. 2903.02 and an unclassified felony.

{¶ 2} Appellant met Cassandra Dunlap in September 2010. According to appellant, the two began a romantic relationship although Cassandra denied such. Appellant also had a girlfriend or fiancée, Kimberly Tilley, at the time. Appellant and Cassandra smoked marijuana together, along with Cassandra's brother, Armond Paul

Dunlap, Jr. ("J.R."). In October 2010, appellant asked Cassandra if he could borrow J.R.'s scales. Appellant picked up the scales from J.R. on Friday, October 22, 2010, and J.R. told appellant he wanted the scales back by Saturday. Appellant did not return the scales on Saturday. On that same Saturday, according to appellant, Cassandra began calling appellant. Appellant was with Tilley, so he did not answer the calls. Eventually, appellant answered a call from a phone number he did not recognize. The caller threatened appellant, and appellant heard Cassandra in the background start threatening him. Appellant changed his cell phone number that day and began carrying a gun.

{¶ 3} On October 24, 2010, J.R. and Cassandra drove to a neighborhood store to buy cigarettes. Around the same time, appellant walked to the same store. He met a woman along the way, Karen Mundel, and walked with her the rest of the way. When they arrived at the store, appellant saw J.R.'s car in the parking lot. Appellant entered the store, and Cassandra began asking appellant about J.R.'s scales. Although J.R. told appellant that it would be okay if appellant returned the scales later, Cassandra and appellant began arguing, prompting appellant to announce he was "strapped," according to a store employee, which meant he was carrying a gun.

{¶ 4} Cassandra and J.R. left the store, and appellant followed them. Outside the store, appellant continued to follow Cassandra and J.R. and appellant and Cassandra continued to argue. Appellant testified that J.R. walked to his car, rummaged inside it, and then returned to the group, although Cassandra denied such. Cassandra testified that appellant and J.R. started to argue regarding something offensive appellant said to J.R. When Mundel exited the store, the four of them walked toward the back of the building with Cassandra, J.R., and appellant still arguing. According to appellant, although J.R. told appellant to call him to arrange the return of the scales, when appellant tried to input J.R.'s phone number into his cell phone, Cassandra took his phone and told him he would get it back after he returned the scales, all of which Cassandra denied. Appellant testified that he then began walking away, at which point Cassandra told J.R. that she had given appellant some birthday money belonging to J.R.'s son, causing J.R. to become angry. Cassandra denied she ever said anything to J.R. about birthday money. Appellant testified that J.R. punched him, and the two engaged in a short physical altercation. Cassandra testified it was appellant who swung at J.R. first. Appellant testified that J.R.

then reached into his sweatshirt pocket, and, believing J.R. was reaching for a gun, appellant shot J.R. eight times. Mundel ran away, and appellant ran to his mother's home, while Cassandra searched J.R.'s pockets looking for car keys. No gun was found in J.R.'s possession. Cassandra testified her brother has never owned a gun. Later that day, appellant turned himself in to police.

{¶ 5} Appellant was indicted on murder with specification, attempted murder with specification, tampering with evidence, and carrying a concealed weapon. A bench trial was held on the carrying a concealed weapon charge, and the remaining charges were heard before a jury. The jury found appellant not guilty of attempted murder but was unable to reach a verdict on the murder charge. The court granted appellant's motion to dismiss the tampering with evidence charge but found him guilty on the carrying a concealed weapon charge.

{¶ 6} A retrial was held on the murder charge, and appellant raised self-defense as an affirmative defense. The jury found appellant guilty of murder. On October 11, 2011, the trial court sentenced appellant to a prison term of 15 years to life on the murder charge, a consecutive three-year term for the firearm specification, and 18 months on the carrying a concealed weapon charge, which was to be served concurrently with the murder charge, resulting in an aggregate sentence of 18 years to life. Appellant appeals the judgment of the trial court, asserting the following assignment of error:

> THE DEFENDANT WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL, THE RIGHT TO PRESENT A DEFENSE, AND DUE PROCESS OF LAW WHEN THE TRIAL COURT GAVE CONFUSING AND MISLEADING INSTRUCTIONS ON THE LAW OF SELF-DEFENSE. THIS ERROR WAS FURTHER COMPOUNDED BY THE PROSECUTOR'S ERRONEOUS AND MISLEADING MISSTATEMENTS TO THE JURORS ON THE LAW OF SELF-DEFENSE SINCE THE ERRONEOUS AND MISLEADING MISSTATEMENTS WOULD HAVE CAUSED THE JURY TO REJECT THE LAWFUL AND VALID CLAIM OF SELF-DEFENSE PRESENTED BY THE DEFENDANT.

{¶ 7} Appellant argues in his assignment of error that the trial court erred when it gave confusing and misleading instructions on the law of self-defense. Absent an abuse of discretion, this court must affirm the trial court's language in the jury instructions.

Henderson v. Spring Run Allotment, 99 Ohio App.3d 633, 638 (9th Dist.1994). The term "abuse of discretion" connotes more than an error of judgment; rather, it implies that the trial court's attitude was arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 8} With regard to self-defense, the jury instructions given in the present case provided, in pertinent part:

> The Defendant raises the affirmative Defense of Self-Defense. The burden of proving the affirmative defense of Self-Defense is upon the Defendant. He must establish the defense by a preponderance of the evidence.
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> * * *
>
> To establish self-defense, the Defendant must prove by a preponderance all of the following: (1) the Defendant was not at fault in creating the situation giving rise to the affray; (2) the Defendant had an honest 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 even if he was mistaken; and (3) the Defendant did not violate any duty to retreat or avoid the danger.
>
> If the Defendant had a reasonable and honest belief that he was in imminent danger of death or great bodily harm and that the only means of escape from such danger was by killing his assailant, then he was justified even though he was mistaken as to the existence of such danger.
>
> Resort to the use of a deadly weapon is not permitted because of words. Vile or abusive language, or verbal threats, no matter how provocative, do not justify an assault or the use of a deadly weapon.
>
> In determining whether the defendant had reasonable grounds for an honest belief that he was in imminent danger, you must put yourself in the position of this Defendant, with his characteristics, his knowledge or lack of knowledge, and under the circumstances and conditions that surrounded him at that time. You must consider the conduct of Armond P. Dunlap, Jr. and determine if his acts and words caused the Defendant to reasonably and honestly believe that he was about to be killed or to receive great bodily harm.

* * *

> The Defendant must establish that the other party was the aggressor and that the Defendant did not himself provoke and cause the injury. The defense of self-defense is not available to the person who starts a fight unless, in good faith, he withdraws from the contest and informs the other party of his withdrawal, or by words or acts reasonably indicates that he has withdrawn and is no longer participating in the fight.
>
> A Defendant is not in a position to claim self-defense if he sought trouble and armed with a dangerous weapon, he provoked a fight or renewed a fight that had broken off and did not attempt to avoid it or leave the scene of the trouble.
>
> If, in the careful and proper use of his faculties, the Defendant honestly believed and had reasonable grounds to believe that an assailant was not able and did not intend to kill or do great bodily harm to the Defendant, then the Defendant, having notice of his adversary's position, was released from the danger, and the right to use force in self-defense ended. If thereafter, the Defendant continues to fight, he becomes the aggressor and a subsequent injury to another is unlawful.

{¶ 9} Appellant contends that the state of Ohio, plaintiff-appellee, and the trial court improperly communicated to the jury that the defendant had no legal right to resort to self-defense, even if he had a reasonable belief that he was in imminent danger of death or great bodily harm, due to appellant's repeated decisions to come into contact with Cassandra and J.R. at the store, which we discuss in more detail below. The prosecutor argued to the jury that appellant could not voluntarily walk into a dangerous situation and then justifiably kill a person.

{¶ 10} Appellant claims that the jury instructions were misleading and confusing because they did not define "not at fault" and "duty to avoid danger." Appellant asserts the instructions are an incorrect and inaccurate statement of law because they are so broad that they would allow jurors to find that the defendant did not prove self-defense, when all of the elements were proven, based upon factors that were not legally relevant to his right to use self-defense. Appellant contends a citizen can never lose his right to self-defense if he is engaged in lawful activity, and he can never be at fault for creating a deadly situation unless he engages in conduct that justifies the other person's use of

deadly force. Appellant asserts he was acting lawfully when he chose to enter the store and at all times leading up to the use of force, and he did not forfeit his right to use self-defense due to any of the acts or omissions suggested by the prosecutor.

{¶ 11} We first note that appellant failed to object to the jury instructions regarding self-defense at trial. Generally, the failure to object at trial or to request a specific instruction waives all but plain error with respect to the jury instructions. *State v. Underwood*, 3 Ohio St.3d 12 (1983), syllabus. Crim.R. 52(B) provides that the court may consider errors affecting substantial rights even though they were not brought to the attention of the trial court. " 'Plain error is an obvious error * * * that affects a substantial right.' " *State v. Yarbrough*, 95 Ohio St.3d 227, 244, 2002-Ohio-2126, ¶ 108, quoting *State v. Keith*, 79 Ohio St.3d 514, 518 (1997). An alleged error constitutes plain error only if the error is obvious and, but for the error, the outcome of the trial clearly would have been different. *Id.* " '[N]otice of plain error is taken with utmost caution only under exceptional circumstances and only when necessary to prevent a manifest miscarriage of justice.' " *State v. Hairston*, 10th Dist. No. 01AP-252 (Sept. 28, 2001), quoting *State v. Lumpkin*, 10th Dist. No. 91AP-567 (Feb. 25, 1992).

{¶ 12} The trial court here told the jurors, through jury instructions, that appellant had no legal right to resort to self-defense, even if he had a reasonable belief that he was in imminent danger of death or great bodily harm, unless he proved to them he was not at fault in creating the situation giving rise to the affray, and he did not violate any duty to retreat or avoid danger. The trial court's jury instructions were precise portrayals of Ohio law on self-defense. It is very well-established that, in order to successfully utilize the affirmative defense of self-defense in a case where a defendant used deadly force, such as the case here, the defendant must prove all three of the following: (1) he was not at fault in creating the situation giving rise to the affray; (2) he had a bona fide belief he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was the use of deadly force; and (3) he did not violate any duty to retreat or avoid the danger. *State v. Jackson*, 22 Ohio St.3d 281, 283 (1986); *State v. Robbins*, 58 Ohio St.2d 74 (1979), paragraph two of the syllabus. This black-letter law mimics the instructions given by the trial court, and it is the language appellant contends is confusing and misleading. Although we are cognizant that the Ohio Jury Instructions are not

binding legal authority, it is significant that the trial court's instructions here are also consistent with the language from the Ohio Jury Instructions. *See State v. Garner*, 5th Dist. No. 2009CA00286, 2010-Ohio-3891, ¶ 13-17, citing 4 *Ohio Jury Instructions*, Section 411.31 (2006); *State v. Jeffers*, 11th Dist. No. 2007-L-011, 2008-Ohio-1894, ¶ 56-59, citing 4 *Ohio Jury Instructions*, Section 411.31 (2006); *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, ¶ 97 (Lanzinger, J., dissenting) (although the Ohio Jury Instructions are not binding legal authority, they are, nonetheless, helpful as an example of the generally accepted interpretation of Ohio statutes); *State v. Nucklos*, 171 Ohio App.3d 38, 2007-Ohio-1025 (2d Dist.) (Ohio Jury Instructions is a respected and authoritative source of the law, but it is merely a product of the Ohio Judicial Conference and not binding on the courts). Insofar as appellant argues that these instructions were confusing and misleading on their face, we decline to find so when the Supreme Court of Ohio and Ohio Jury Instructions have endorsed the same language. Therefore, we find that the jury instructions were a correct statement of the law.

{¶ 13} Appellant attempts to demonstrate the confusing and misleading nature of the self-defense instructions by way of example via the prosecutor's "erroneous and misleading misstatements" to the jury. Appellant asserts that the state, in order to place fault upon appellant for failing to avoid the situation, elicited testimony that (1) appellant went into the store even after noticing J.R.'s car parked outside, (2) appellant did not leave the store as soon as he discovered Cassandra was inside, (3) appellant argued with Cassandra in the store instead of leaving right away, (4) appellant could have remained in the store for a few minutes after Cassandra and her brother left to avoid further confrontation, (5) appellant turned right (toward J.R. and Cassandra) instead of left (away from them) when he exited the store, (6) appellant did not run away once he left the store, and (7) appellant was not lawfully carrying the gun. Appellant claims the prosecutor then mislead jurors by asserting that, even if they found appellant reasonably believed he was in danger, his self-defense claim still failed because he did not prove that he tried to avoid the situation and that he did not retreat based upon these actions.

{¶ 14} Appellant contends that the jury might have wrongfully believed that a person loses his right to defend his life if he lawfully enters a store, argues with an

estranged girlfriend, leaves the store after the argument or fails to run from an argument, which is exactly what the prosecutor was suggesting during his questioning of the witnesses and his arguments before the jury. Appellant asserts that none of the above actions can demonstrate he was "at fault" in creating the situation giving rise to the affray, or that he violated his "duty to avoid danger."

{¶ 15} Appellant cites no authority to support his claim that his actions cited above cannot render him "at fault" or support a finding that he failed "to avoid danger" for purposes of self-defense. Appellant also cites no case law for the proposition that so long as a defendant is engaged in a lawful activity, such lawful activity can never be the basis for creating the situation giving rise to the affray. Indeed, a multitude of courts have found that a defendant is at fault in creating the situation giving rise to the affray or violated a duty to avoid danger or retreat when he chooses to confront the victim, chooses to knowingly go to a place where the victim will be or refuses to move in a direction away from the victim, even when the defendant's action was otherwise completely lawful. *See, e.g., State v. Hall*, 10th Dist. No. 04AP-17, 2005-Ohio-335, rev'd in part on other grounds in *In re Ohio Criminal Sentencing Statutes Cases*, 109 Ohio St.3d 313, 2006-Ohio-2109, reconsideration granted in part in *State v. Straughn*, 110 Ohio St.3d 1413, 2006-Ohio-3306 (self-defense not available when defendant acknowledged that he did not have to pursue the victim in the parking lot to try to "smooth things out" after an initial argument but, rather, could have left the scene and retreated safely); *State v. Johnson*, 8th Dist. No. 81814, 2003-Ohio-4180, rev'd on other grounds in *State v. Johnson*, 104 Ohio St.3d 250, 2004-Ohio-6399 (defendant's actions contributed to the altercation when he decided to drive into a parking lot in the first place after having a verbal argument with others, as he easily could have avoided any danger by not entering the parking lot and continuing to a safer destination; furthermore, because defendant saw the others enter their cars with baseball bats, driving to an empty parking lot militates against a finding that defendant's actions were entirely blameless); *State v. Mathews*, 3d Dist. No. 8-02-19, 2002-Ohio-6619 (self-defense instruction not proper when defendant willingly walked upstairs to complain about loud music and entered into an argument with the victim; the situation could have been avoided if defendant had either not gone upstairs to the apartment in the first place, or if he would have just left the hallway and returned to his own apartment);

State v. Nichols, 4th Dist. No. 01CA2775, 2002-Ohio-415 (self-defense instruction not warranted when the defendant was at fault for creating the situation, because he purposely left the tavern seeking to locate and engage the victim and then followed the victim to the parking lot when he could have left well enough alone); *State v. Sudberry*, 12th Dist. No. CA2000-11-218 (Nov. 13, 2001) (self-defense not available when defendant admitted that he could have retreated from the situation before he attempted to return to the house where he had previously engaged in an altercation with his uncle; instead, defendant was at fault when he tried to go back to the house to get his identification card); *State v. Cole*, 5th Dist. No. 98 CAC 01001 (July 2, 1998) (defendant created a situation leading to violence by accompanying his brother onto the victim's property and by approaching the victim; defendant was in a position of safety and could have left with his brother had he chosen to do so but, instead, chose to confront victim thereby creating the very situation which he claims necessitated the use of force). *State v. Bryant*, 12th Dist. No. CA89-09-019 (Aug. 6, 1990) (even if the victim fired his weapon first and defendant believed that he was in imminent danger, defendant failed to demonstrate that he was not at fault in creating the situation giving rise to the shooting when he had threatened the victim with a weapon earlier in the day, and then purposely drove to an area with a weapon, stopped, and waited for the victim; defendant could have avoided the situation by refusing to follow the victim after he drove past defendant's house in the first instance); *State v. Kyle*, 8th Dist. No. 55353 (May 11, 1989) (even if the victim was the initial aggressor in the altercation, defendant could have easily avoided the situation by not walking toward an area where he knew the victim would be in order to confront the victim; defendant decided to create and or escalate the conflict by purposely running into the victim); *State v. Moore*, 10th Dist. No. 87AP-166 (Dec. 8, 1987) (self-defense not available when defendant did not do all he could to avoid the confrontation, as he simply could have walked away while still in the street arguing with the decedent).

{¶ 16} Based upon these cases, we cannot agree with appellant's contention that his actions, as cited above, could not form the basis for the jury to conclude that he was at fault in creating the situation giving rise to the affray or he violated the duty to retreat or avoid the danger. These cases illustrate that the jury could properly find appellant at fault and/or he did not comply with his duty to avoid danger because he chose to enter a place

where he knew the victim and Cassandra would be despite knowing that a confrontation might ensue, he chose to stay in the store even after a confrontation ensued with Cassandra, and he chose to follow the victim and Cassandra out of the store and engage in a further confrontation outside instead of staying inside the store or walking away from the volatile situation. Furthermore, appellant escalated the conflict by announcing in the store that he was carrying a gun, which further demonstrates his failure to avoid any danger. For these reasons, we find the trial court did not abuse its discretion in giving the self-defense jury instructions it did. Therefore, appellant's assignment of error is overruled.

{¶ 17} Accordingly, appellant's single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT and DORRIAN, JJ., concur.

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