[Cite as *State v. Gripper*, 2013-Ohio-2740.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 12AP-396
v.	:	(C.P.C. No. 11CR-03-1523)
Antwan R. Gripper,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 27, 2013

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard*, for appellee.

Kirk A. McVay, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, P.J.

{¶ 1} Defendant-Appellant, Antwan R. Gripper, appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas. For the following reasons, we affirm that judgment.

I. Factual and Procedural Background

{¶ 2} On the morning of March 8, 2010, Willie Williams came to Columbus, Ohio, to visit his family. He arrived at Chris Rice's house, his uncle, and the two drove to Rice's mother's house on the near east side of Columbus. Among the people also at the house were Rice's brother, Shedrick Hawkins, his sister, Shominika Townsell and her boyfriend, Terence Tatum. They were all sitting outside the house enjoying the day when Williams got into an argument with two men from the neighborhood, one named Johntay Pugh.

The altercation appeared to be about gang affiliation. Townsell stepped between the men and separated them. One of the men said that he would be back to shoot the house up. Williams and Rice then left the house to drive Rice's mother to an appointment.

{¶ 3} After Rice and Williams left, a car pulled into the driveway of the house next door to Rice's mother's house. A number of men got out of the car, including appellant. While a couple of the men went inside the house, appellant met up with Pugh and another man, Sherrod Hardgrove outside the house. Hawkins heard appellant say to Hardgrove "[g]ive me my gun, cuz" and then saw appellant take a gun from Hardgrove. (Tr. 247.) At the same time, Rice and Williams were returning to the house. As Rice drove his car into the driveway, Townsell heard Pugh say "there go the car right there, there go the dudes right there. There go the dude right there." (Tr. 304.)

{¶ 4} The three men, Pugh, Hardgrove and appellant, began walking toward the middle of the street in front of the house. Williams attempted to get out of Rice's car and take out his gun, but appellant started shooting in his direction. Williams tried to get away from appellant, but appellant kept shooting. Williams died as the result of multiple gunshot wounds.

{¶ 5} As a result of Williams' death, a Franklin County Grand Jury indicted appellant with one count of aggravated murder in violation of R.C. 2903.01, one count of murder in violation of R.C. 2903.02, and one count of having a weapon while under disability in violation of R.C. 2923.13. Both murder counts also contained firearm specifications pursuant to R.C. 2941.145. Appellant entered a not guilty plea to the charges and proceeded to a jury trial.

{¶ 6} At trial, Rice, Hawkins and Townsell testified to the above version of events. Appellant testified that he was in the neighborhood visiting with friends. He was walking down the street to another friend's house when he saw Rice's car pull into the driveway. He then saw the passenger, Williams, jumping out of the car with two guns aiming at him. Appellant ducked and then Williams shot at him. Appellant looked for somewhere to run but instead picked up Hardgrove's gun, which somehow came out and slid toward him, and shot at Williams because he was terrified that he was going to be shot. Another witness testified that Williams fired first after getting out of the car.

{¶ 7} Amy Amstutz, a forensic scientist with the Columbus Police Department's Crime Lab, testified about the ballistic evidence found at the scene: two guns and more than 20 shell casings. One of the guns, a .380 Cobra, was Williams'. Amstutz testified that none of the casings found at the scene were fired by Williams' gun (although gun shot residue was found on Williams' hands). The other gun found at the scene, a Luger 9mm, was Townsell's gun. That gun fired five shots, and those casings were all found in the back of the house. Tatum testified that he fired those shots at a gray car as it attempted to drive away after the shooting. Amstutz further testified that there were 17 bullet casings found in the street in front of the house. Those casing were all shot from one gun, but that was neither the Luger 9mm or the .380 Cobra.

{¶ 8} The jury ultimately found appellant not guilty of aggravated murder but rejected his claim of self-defense and found him guilty of murder and the firearm specification. The trial court also found him guilty of having a weapon while under disability and sentenced him accordingly.

II. The Appeal

{¶ 9} Appellant appeals and assigns the following errors:

> [1.] Appellant was denied his rights to due process of law and a fair trial guaranteed under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution when the prosecutors improperly and repeatedly argued facts not in evidence to the jury, prejudicially affecting substantial rights of appellant.
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> [2.] The trial court abused its discretion, denying appellant his rights to due process of law and a fair trial guaranteed under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution when the trial court failed to instruct the jury as requested by appellant on the matter of self defense.
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> [3.] The trial court erred, depriving defendant-appellant of his rights to due process of law and a fair trial under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution when it denied appellant's Crim.R.29 motion for acquittal at the conclusion of appellant's case when the preponderance of the evidence supported appellant's assertions of self defense.

> [4.] The trial court erred, denying appellant his rights to due process of law and a fair trial guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution when it found appellant guilty to count three of the indictment, to wit: having weapon while under disability when said verdict was not supported by the evidence.

A. Appellant's First Assignment of Error—Prosecutorial Misconduct

{¶ 10} Appellant contends that the prosecutor engaged in misconduct by improperly arguing to the jury during closing arguments that someone pointed out Williams to appellant before the shooting and that appellant asked Hardgrove for the gun. Appellant argues that the prosecutor's comments misrepresented the evidence and were based on improper inferences. We disagree.

{¶ 11} Prosecutors are entitled to latitude regarding what the evidence has shown and what inferences can be drawn therefrom. *State v. Cunningham*, 105 Ohio St.3d 197, 2004-Ohio-7007, ¶ 83, quoting *State v. Richey*, 64 Ohio St.3d 353, 362 (1992). Whether improper remarks constitute prosecutorial misconduct requires analysis as to (1) whether the remarks were improper and, (2) if so, whether the remarks prejudicially affected the accused's substantial rights. *Id.* at ¶ 78, citing *State v. Smith*, 14 Ohio St.3d 13, 14-15 (1984). The touchstone of the analysis " 'is the fairness of the trial, not the culpability of the prosecutor.' " *Id.*, quoting *Smith v. Phillips*, 455 U.S. 209, 219 (1982).

{¶ 12} Appellant's trial counsel did not object to any of the instances appellant now complains were improper. The failure to object forfeits all but plain error in this regard. *Columbus v. Bishop*, 10th Dist. No. 08AP-300, 2008-Ohio-6964, ¶ 55, citing *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, ¶ 126.

{¶ 13} Appellant first complains that the prosecutor argued that someone pointed out Williams to appellant without any evidence to support that fact and that there was also no evidence indicating appellant knew of the earlier confrontation between Pugh and Williams. We disagree. Townsell testified that as Williams and Rice drove up to the house, Pugh said "there go the car right there, there go the dudes right there. There go the dude right there." (Tr. 304.) Townsell testified that after Pugh said that, the men, including appellant, ran to the car and began shooting. Thus, her testimony supports the argument that Williams had been pointed out before the shooting. Additionally, Hawkins

testified that before the shooting, he saw a gray car pull into the driveway next to his mother's house. He saw a number of men, including appellant get out of the car. Appellant then met with Pugh. This testimony, coupled with Pugh's later statement pointing Williams out, allows for the reasonable inference that Pugh and appellant had discussed the earlier altercation.

{¶ 14} We also reject appellant's argument that it was improper for the prosecutor to argue that appellant asked Hardgrove for a gun. Shedrick Hawkins testified that he saw appellant meet up with Sherrod Hardgrove shortly before the shooting and say "[g]ive me my gun, cuz" and grabbed the gun from Hardgrove. (Tr. 247.)

{¶ 15} Appellant has not demonstrated prosecutorial misconduct that deprived him of a fair trial. Accordingly, we overrule his first assignment of error.

B. Appellant's Second Assignment of Error—Self-Defense Jury Instruction

{¶ 16} Appellant complains that the trial court abused its discretion when it refused to provide his requested jury instructions on self-defense. We disagree.

{¶ 17} When reviewing a trial court's jury instructions, the proper standard of review for an appellate court is whether the trial court's refusal to give a requested jury instruction constituted an abuse of discretion under the facts and circumstances of the case. *State v. Stewart*, 10th Dist. No. 10AP-526, 2011-Ohio-466, ¶ 9, citing *State v. Wolons*, 44 Ohio St.3d 64, 68 (1989). Although an abuse of discretion is typically defined as an unreasonable, arbitrary, or unconscionable decision, *State v. Beavers*, 10th Dist. No. 11AP-1064, 2012-Ohio-3654, ¶ 8, we note that no court has the authority, within its discretion, to commit an error of law. *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶ 70.

{¶ 18} To establish self-defense, the following elements must be shown: (1) the accused was not at fault in creating the situation giving rise to the affray; (2) the accused has 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) the accused must not have violated any duty to retreat or avoid the danger. *State v. Melchior*, 56 Ohio St.2d 15, 20-21 (1978).

{¶ 19} Here, the trial court provided the jury with the self-defense instruction found in the Ohio Jury Instructions which repeat the elements set forth above. Appellant requested, however, that the trial court go beyond that instruction and further instruct the jury regarding the defendant's duty to retreat and whether or not the defendant was at fault for creating the situation giving rise to the altercation. Specifically, regarding his duty to retreat, he requested that the trial court instruct that retreat is only required when it is possible to do so in complete safety, and that running away from someone with a gun provides little or no opportunity for complete safety. *See State v. Marbury*, 2d. Dist. No. 19226, 2004-Ohio-1817, ¶ 22. In regards to whether he was at fault for creating the situation, he asked the trial court to instruct that he must establish that he had not engaged in such wrongful conduct toward his assailant that his assailant was provoked to attack, and that such a showing does not require that he played no part in creating the situation, and also would allow for him to be engaged in criminal conduct while being attacked. *See State v. Gillespie*, 172 Ohio App.3d 304, 2007-Ohio-3439, ¶ 17 (2d. Dist.).

{¶ 20} The trial court refused to give appellant's requested instructions but advised trial counsel that he could make those arguments to the jury regarding self-defense. The trial court's decision was not an abuse of its discretion.

{¶ 21} In regards to the first prong of self-defense, appellant's proposed instruction basically reiterated the same "not at fault" concept but with different language. *See State v. Turner*, 175 Ohio App.3d 250, 2008-Ohio-1578, ¶ 28 (2d Dist.) ("[t]he first prong of a claim of self-defense * * * requires a defendant to show that he was not at fault in creating the situation, i.e., that he had not engaged in such wrongful conduct toward his assailant that the assailant was provoked to attack."). Thus, the instruction would largely be duplicative of the instruction already given. Second, in regards to his duty to retreat, the language in *Marbury* which appellant quotes in support of the proposed instruction is dicta and has never been adopted or even considered by this or any other appellate court. Moreover, the *Marbury* court's dicta expanded on a Supreme Court of Ohio case dealing with the duty to retreat in a locked prison cell. *State v. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-3751. The *Cassano* court concluded that retreat was impossible under those circumstances and that an instruction regarding the duty to

retreat was therefore erroneous. That opinion provides little support for the dicta in *Marbury*.

{¶ 22} The trial court did not abuse its discretion by refusing to give appellant's requested jury instructions on self-defense. Accordingly, we overrule appellant's second assignment of error.

C. Appellant's Third Assignment of Error- Self-Defense

{¶ 23} In this assignment of error, appellant argues that the trial court erred in denying his motion for acquittal pursuant to Crim.R. 29 because the preponderance of the evidence proved his claim that he acted in self-defense. We disagree.

{¶ 24} Self-defense is an affirmative defense. *State v. Campbell*, 10th Dist. No. 07AP-1001, 2008-Ohio-4831, ¶ 21, citing *State v. Calderon*, 10th Dist. No. 05AP-1151, 2007-Ohio-377, ¶ 30. A review for sufficiency of the evidence[1] does not apply to affirmative defenses, because this review does not consider the strength of defense evidence. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶ 37; *State v. Harrison*, 10th Dist. No. 06AP-827, 2007-Ohio-2872, ¶ 23; *State v. Levonyak*, 7th Dist. No. 05 MA 227, 2007-Ohio-5044, ¶ 38-41. The claim of insufficient evidence challenges the sufficiency of the state's evidence. Thus, appellant cannot challenge the jury's rejection of his claim of self-defense on the ground of sufficiency of the evidence. *State v. Cooper*, 170 Ohio App.3d 418, 2007-Ohio-1186, ¶ 15 (4th Dist.); *Harrison*. Accordingly, we overrule appellant's third assignment of error.[2]

D. Appellant's Fourth Assignment of Error—Having a Weapon While Under Disability Conviction

{¶ 25} Appellant argues that his conviction for having a weapon while under disability is in error because he only possessed the gun to act in self-defense after Williams jumped out of the car and fired at him. *See State v. Hardy*, 60 Ohio App.2d 325

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[1] Our review of a decision denying a Crim.R. 29 motion for acquittal is the same as a sufficiency review, because a Crim.R. 29 motion tests the sufficiency of the state's evidence. *State v. Berry*, 10th Dist. No. 10AP-1187, 2011-Ohio-6452, ¶ 8; *State v. Reddy*, 10th Dist. No. 09AP-868, 2010-Ohio-3892, ¶ 12.

[2] Although appellant did not assign as error that his convictions are against the manifest weight of the evidence, he nevertheless argues in this assignment of error that his convictions are against the manifest weight of the evidence. This court rules on assignments of error, not mere arguments. *D.L. Lack Corp. v. Liquor Control Comm.*, 191 Ohio App.3d 20, 2010-Ohio-6172, ¶ 19 (10th Dist.). We do note, however, that appellant's manifest weight argument is based solely on the arguments we have already rejected in his first and second assignments of error.

(8th Dist.1978) (creating narrow exception to having a weapon while under disability if gun possessed for self-defense). We disagree.

{¶ 26} The *Hardy* exception does not apply to the facts of this case. In *Hardy*, the defendant grabbed a gun only in self-defense to protect himself during a robbery. The court concluded that in such a situation, "the prohibitions of R.C. 2923.21 do not restrict the right of an individual under disability from acting in self-defense, when he did not knowingly acquire, have, carry or use a firearm previously." *Id.* at 330. Here, the weight of the evidence indicates that appellant obtained the gun from Hardgrove before Williams got out of the car in anticipation of the confrontation, not in response to a confrontation. *State v. Escoto*, 10th Dist. No. 98AP-481 (Feb. 18, 1999) (*Hardy* exception not applicable where defendant brought gun into situation); *State v. Martz*, 163 Ohio App.3d 780, 2005-Ohio-5428, ¶ 41-43 (5th Dist.) (*Hardy* exception not applicable where offender possessed gun before confrontation). Because the *Hardy* exception does not apply to appellant's conduct, we overrule appellant's fourth assignment of error.

III. Conclusion

{¶ 27} Having overruled appellant's four assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

SADLER and VUKOVICH, JJ, concur.

VUKOVICH, J., of the Seventh Appellate District, sitting by assignment in the Tenth Appellate District.
