[Cite as *State v. Stewart*, 2013-Ohio-1463.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 12AP-527 (C.P.C. No. 10CR-12-7416)
Luther Stewart,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on April 11, 2013

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Todd W. Barstow, for appellant.

APPEAL from the Franklin County Court of Common Pleas

McCORMAC, J.

{¶ 1} Luther Stewart, defendant-appellant ("appellant"), was indicted by the Franklin County Grand Jury on December 21, 2010 on one count of felonious assault, a felony of the second degree. Appellant entered a not guilty plea, and on May 11, 2012, a jury found appellant guilty of the charge. On May 21, 2012, the trial court held a sentencing hearing and imposed a prison term of four years. Appellant has perfected a timely appeal to this court asserting the following assignments of error:

> I. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT AND DENIED HIM A FAIR TRIAL AND DUE PROCESS OF LAW PURSUANT TO THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTION TEN OF THE OHIO CONSTITUTION BY GIVING INCORRECT JURY

INSTRUCTIONS ON THE ISSUE OF SELF DEFENSE AND OHIO'S "CASTLE DOCTRINE."

II. THE TRIAL COURT ERRED AND DEPRIVED APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTION TEN OF THE OHIO CONSTITUTION BY FINDING HIM GUILTY OF FELONIOUS ASSAULT AS THAT VERDICT WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE AND WAS ALSO AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 2} The State presented two witnesses, one of whom was Stephen Lucas ("Lucas") and the other was Columbus Police Officer Brant. Photos were also introduced without objection and the parties entered into a stipulation of evidence concerning injuries suffered by the alleged victim, Lucas. Lucas testified that he has been licensed as a cosmetologist since 1984 and he mainly does hair styling. He brings lots of equipment with him when he renders his services at the home of the client. He had styled the hair of appellant's wife ("Shrree") on a number of occasions, mostly at the home of her mother who had recommended and introduced Lucas to her. Pursuant to a telephone appointment, Lucas arrived at the Stewart home at the invitation of Shrree. He began to perform his duties in the kitchen of her home with a process that takes about three hours. About half way through the process, appellant came home and asked to speak to Lucas outside. Lucas said that they had an amiable conversation for awhile, but eventually appellant changed his amiability and became confrontational and angry. Lucas told appellant he would just go back inside and retrieve his professional equipment. As he began to open the front door, appellant slapped his hand away. Lucas testified that appellant then attacked him with his fists ultimately causing a serious injury to his eye. Columbus paramedics were called and took Lucas to the hospital. After appellant had initially agreed to Lucas retrieving his equipment which Lucas said was valuable, appellant then said "stop." He then grabbed Lucas and threw him off the porch onto the ground, ultimately striking him with one or more punches to the face causing the injury to his eye which required an operation and still bothers him a great deal.

{¶ 3} Lucas denied touching appellant at all before being assaulted and stated that he only wanted to retrieve his property. Lucas did not recall appellant telling him not

to come into the house or offering to retrieve his property for him. He recalled that his face was throbbing and bleeding and his client, Shrree, was trying to get appellant off of him. She then brought Lucas into the house and he was able to retrieve his belongings. She also called 9-1-1 and Lucas was taken to Grant Hospital where it was discovered that he had suffered an orbital bone fracture, a torn eyeball which had to be sutured, and injuries to his right eyeball requiring implantation of a new lens. He also had a concussion.

{¶ 4} When called as a rebuttal witness, Lucas testified that he did not sleep with women because he is homosexual and that he had never told anyone he slept with women.

{¶ 5} The other witness called by the State was Detective Brant who testified that she was assigned to investigate the offense and that she interviewed appellant. She said appellant admitted that he struck Lucas outside of his house. She said that Shrree did not return her calls and that she was not apprised that there were any neighbors who witnessed the altercation. Before resting their case, the State and appellant entered into a stipulation relative to the medical records that showed a description of the injuries suffered by Lucas. Pictures of Lucas's face and eyeball were also introduced as was a picture of the porch that has relevance concerning whether the "castle doctrine" is applicable.

{¶ 6} Those records were all admitted without objection.

{¶ 7} Appellant's case consisted primarily of his own testimony together with brief testimony of a neighbor, Mrs. Booker. Booker testified that on October 2, she was unloading her car when she saw and heard an argument on appellant's front porch. She heard loud noises and appellant stating " '[y]ou're not going in my house,' and 'I'll get your stuff.' " She saw appellant standing there talking to another gentlemen whom she did not know. She said that their voices started to escalate and they got a little loud and that is when she looked over there. All she heard was appellant saying that "[y]ou're not going in my house" and "I'll get your stuff for you." (Tr. 106.) Booker said the unknown guy kind of tugged and pushed at appellant to move him out of the way because appellant was at his door and she guessed that the guy was trying to get in there. She said it was the other guy rather than appellant who was trying to move somebody. Booker then said a tussle ensued on the porch where they were grabbing at each other and they fell off the porch.

The porch is a high porch that is kind of raised. She ran and got her husband and she did not actually see what her husband did. The husband did not testify. (Tr. 107.)

{¶ 8} Appellant testified that Lucas grabbed him and threw him off the porch and was on top of him. He admitted that he threw at least one punch at him. He claimed some minor injuries that he feared may have aggravated serious injuries he had had before. Officer Brant talked to him and said that she did not see any injuries. At the scene, appellant did not accept any first aide treatment or make any claims of injuries. At the time that Lucas and appellant fell off the porch, appellant said that he had changed his mind about Lucas going into his house and that he would get his stuff. Appellant was initially on a third step of the porch and Lucas was on the first step. They were both apparently at the top of the porch when they fell to the ground. No weapons were involved other than appellant's fists.

{¶ 9} Appellant rested his case and the attorneys for the parties entered into a discussion about the trial court's charge to the jury. The trial court had prepared a proposed set of instructions. Appellant's counsel requested that the trial court charge on self-defense and on the "castle doctrine." The State's attorney opposed the self-defense and the instruction on the castle doctrine as not being applicable. However, he continued to proceed to assist the court in the formation of the final instructions. The trial judge did include charges concerning self-defense and the castle doctrine. Both parties approved the submission of the instructions to the jury and neither counsel objected to the instructions as given although given an opportunity to do so at the end of the instructions. Appellant claims that the trial court erred in its instructions to the jury on self-defense and the "castle doctrine." Because he did not object to the instructions, appellant must demonstrate plain error. Crim.R. 30(A) provides that: "On appeal, a party may not assign as error the giving or the failure to give any instructions unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection." Therefore, appellant "is precluded from claiming error in the instructions to the jury unless the instructions constitute plain error under Crim.R. 52(B)." *State v. McCowan*, 10th Dist. No. 06AP-153, 2006-Ohio-604.

{¶ 10} Plain error is an obvious defect in trial proceedings effecting substantial rights; reviewing courts are to notice plain error "with upmost caution under exceptional

circumstances and only to prevent a manifest miscarriage of justice." *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). A trial court is not required to instruct a jury on an affirmative defense when the evidence is insufficient to support the instruction. *State v. Daniels*, 10th Dist. No. 09AP-976, 2010-Ohio-3745, citing *State v. Melchior*, 56 Ohio St.2d 15, 21-22 (1978). "If there is no evidence to support an issue, the trial court will not instruct the jury on that issue." *Murphy v. Carrolton Mfg. Co.*, 61 Ohio St.3d 585, 591 (1991). The evidence in this case did not support a self-defense instruction. To prove the affirmative defense of self-defense, the defendant must establish that: (1) he was not at fault in creating the situation giving rise to the affray; (2) that he had a bonafide belief that he was in eminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of force; and (3) he must not have violated any duty to retreat or avoid the danger. *State v. Robins*, 58 Ohio St.2d 74 (1979), paragraph two of the syllabus. "If the defendant fails to prove any one of these elements by a preponderance of the evidence, he has failed to demonstrate that he acted in self-defense." *State v. Jackson*, 22 Ohio St.3d 281, 284 (1986). There is no viable evidence that appellant tried to avoid the danger. In fact, the evidence shows that, if appellant had simply allowed Lucas to reenter the premises to gather up his equipment and leave, no confrontation would have taken place. Additionally, Lucas was at the premises in regard to the invitation of appellant's spouse with his equipment still remaining in the house and with the consent of the spouse not having been withdrawn, he was not a trespasser from whom fears of physical harm could eminate.

{¶ 11} In summary, the self-defense instruction should not have been provided to the jury. The plain error doctrine does not apply to the self-defense charge even if it was erroneous. In reviewing the instructions, we find that they are not a model of clarity. However, they were reviewed by the trial court together with the attorneys for both parties, all of whom approved the ad hoc changes in which they corroborated with the court.

{¶ 12} The second disputed instruction was that of the "castle doctrine." That doctrine is codified in R.C. 2901.05(B) as follows: "[T]he castle doctrine * * * applies to situations where an intruder enters a home and the resident chooses force to protect himself or his family." *See State v. Madera*, 8th Dist. No. 93764, 2010-Ohio-4884. It was

not applied where a party of drunken friends dissolved into an all out brawl and subsequently, the resident attacked a guest to forcefully remove him from the premises. In this case, appellant and Lucas knew each other for approximately three years and Lucas had been hair styling for appellant's wife and had even done so at his home before with his knowledge. Also as pointed out before, on the day of the offense, Lucas had been invited to the house by appellant's wife and he was lawfully at the house when appellant attacked him. Under those facts, the "castle doctrine" does not apply. *See State v. Hogg*, 10th Dist. No. 11AP-50, 2011-Ohio-6454, where the court held that when the victim was lawfully in defendant's house, he could not be removed as if he were an intruder.

{¶ 13} Eventually, appellant was on the front outside part of the house which does not constitute part of the "residence" under R.C. 2901.05 that would allow him to invoke the castle doctrine. Specifically, R.C. 2901.05(D)(3) defines "residence" as "a dwelling" and division (D)(2) defines a "dwelling" as follows:

> "Dwelling" means a building or conveyance of any kind that has a roof over it and that is designed to be occupied by people lodging in the building or conveyance at night, regardless of whether the building or conveyance is temporary or permanent or is mobile or immobile. As used in this division, a building or conveyance includes, but is not limited to, an attached porch, and a building or conveyance with a roof over it includes, but is not limited to, a tent.

{¶ 14} The testimony contained definitions of the "porch" as very small and with three steep steps up to this area. It does not have a roof over it nor is it designed to be occupied by people lodging in the building. Instead it was described as a small three-step stoop with no room for even a chair. The picture of the "porch" which was admitted into evidence conclusively demonstrates that this area which, more appropriately could be called a stoop, does not meet even the most liberal definition of a dwelling defined under the revised code.

{¶ 15} In summary, both of the requested instructions by appellant were unsupported by the evidence. The contested instructions and any errors applicable thereto were harmless to appellant. Plain error does not apply as the charges were requested by appellant and used by appellant in an attempt to gain a jury advantage to him.

{¶ 16} Appellant's first assignment of error is overruled. There was no violation of due process either under the Fourteenth Amendment to the United States Constitution or Article I, Section 10 of the Ohio Constitution.

{¶ 17} In his second assignment of error, appellant contends that the guilty verdict of felonious assault was not supported by sufficient evidence and was also against the manifest weight of the evidence.

{¶ 18} The concepts of sufficiency of the evidence and manifest weight of the evidence charge is distinct. *State v. Thompkins*, 78 Ohio St.3d 380 (1997). Sufficiency of the evidence is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict is a matter of law. *Id*. at 386. Verdicts not supported by sufficient evidence violates a defendant's due process rights. *Tibbs v. Florida*, 457 U.S. 31 (1982). The test as stated in *Thompkins* for judging the sufficiency of the evidence is as follows:

> [S]ufficiency of the evidence, " 'sufficiency' is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law."

Thompkins at 386.

{¶ 19} When there is conflicting evidence "it [is] the function of the jury to weigh the evidence and assess the credibility of the witnesses in arriving at its verdict." *State v. Jenks*, 61 Ohio St.3d 259, 279 (1991). "It is not the function of an appellate court to substitute its judgment for that of the factfinder." *Id.* It is in the minds of the jurors rather than in a reviewing court that must be convinced. *State v. Thomas*, 70 Ohio St.2d 79, 80 (1982).

{¶ 20} A court reviewing the sufficiency of the evidence must consider the totality of all the evidence construing all the evidence in the light most favorable to the prosecution. The mere existence of conflicting evidence cannot make the evidence insufficient as a matter of law. *State v. Murphy*, 91 Ohio St.3d 516, 543 (2001).

{¶ 21} After construing the facts of this case, there is no doubt that if the jury found the testimony of Lucas to be credible, any reasonable jury member would find that appellant was guilty of the crime of felonious assault.

{¶ 22} In determining whether a verdict is against the manifest weight of the evidence, this court acts as a "thirteenth juror." This role allows the court to weigh the evidence in order to determine whether the trier of fact "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Thompkins* at 387. The power to reverse on "manifest weight" grounds should only be used in exceptional circumstances i.e., when "the evidence weighs heavily against the conviction." *Id*.

{¶ 23} An appellate court acting in its role as "thirteenth juror" also must keep in mind the trier of facts superiority of first-hand position in judging the demeanor and credibility of witnesses. "On the trial of a case either civil or criminal, the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus.

{¶ 24} This case is far from the exceptional circumstances required, which must be supported by the concurrence of all three appellate judges. Appellant's second assignment of error is overruled.

{¶ 25} Appellant's assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT and TYACK, JJ., concur.

McCORMAC, J., retired, formerly of the Tenth Appellate District, assigned to active duty under the authority of Ohio Constitution, Article IV, Section 6(C).