[Cite as *State v. Ramey*, 2010-Ohio-2661.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- DANIEL J.M. RAMEY Defendant-Appellant	JUDGES: Hon. Julie A. Edwards, P.J. Hon. Sheila G. Farmer, J. Hon. Patricia A. Delaney, J. Case No. 09CAA090081 O P I N I O N
CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 08 CRI 12 0587
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 11, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
CAROLYN HAMILTON O'BRIEN 140 North Sandusky Street Delaware, OH 43015 Columbus, OH 43215	ROGER SOROKA JESSE PHILICIA KANNER 637 Mohawk Street Suite 100 Columbus, OH 43206

Farmer, J.

{¶1} On December 5, 2008, the Delaware County Grand Jury indicted appellant, Daniel Ramey, on two counts of felonious assault in violation of R.C. 2903.11 and two counts of assault in violation of R.C. 2903.13. Said charges arose from an incident in a bar, Gabby's Place, during an annual Halloween party.

{¶2} A jury trial commenced on August 27, 2009. The jury found appellant guilty of felonious assault against David Duffy, and not guilty of the remaining charges. By judgment entry of sentence filed September 1, 2009, the trial court sentenced appellant to two years in prison.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "APPELLANT'S CONVICTION FOR FELONIOUS ASSAULT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

II

{¶5} "APPELLANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE SIXTH AND FOURTEEN AMENDMENTS TO THE UNITED STATES CONSTITUTION."

I

{¶6} Appellant claims his conviction for felonious assault was against the manifest weight of the evidence as the overwhelming evidence supported his defense of self-defense. We disagree.

{¶7} On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine "whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Martin* (1983), 20 Ohio App.3d 172, 175. See also, *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶8} Appellant was convicted of felonious assault in violation of R.C. 2903.11(A) which states, "No person shall knowingly do either of the following, cause or attempt to cause serious physical harm to another or to another's unborn."

{¶9} "To establish self-defense, a defendant must prove the following elements: (1) that the defendant was not at fault in creating the situation giving rise to the affray; (2) that the defendant 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) that the defendant did not violate any duty to retreat or avoid the danger. *State v. Robbins* (1979), 58 Ohio St.2d 74, 12 O.O.3d 84, 388 N.E.2d 755, paragraph two of the syllabus. Although a victim's violent propensity may be *pertinent* to proving that he acted in a way such that a defendant's responsive conduct satisfied the elements of self-defense, no element *requires* proof of the victim's character or character traits. A defendant may successfully assert self-defense without resort to proving *any* aspect of a victim's character. Therefore, Evid.R. 405(B) precludes a defendant from introducing specific instances of the victim's conduct to prove that the

victim was the initial aggressor.***" (Footnote and citations omitted.) *State v. Barnes,* 94 Ohio.St.3d 21, 24, 2002-Ohio-68.

{¶10} "Self-defense is an affirmative defense and the burden of going forward with evidence on that issue, and the burden of proof by a preponderance of the evidence, is upon the accused. R.C. 2901.05(A); *State v. Palmer,* 80 Ohio St.3d 543, 1997-Ohio-312." *State v. Horton,* Stark App. No. 2007-CA-00085, 2007-Ohio-6469, ¶108. "The proper standard for determining whether a criminal defendant has successfully raised an affirmative defense is to inquire whether the defendant has introduced sufficient evidence which, if believed, would raise a question in the minds of reasonable men concerning the existence of the issue." Id. at ¶110.

{¶11} The evidence was presented under the backdrop of a friendly neighborhood bar wherein the patrons were celebrating Halloween. The victim, David Duffy, was dressed as "Shrek," green paint included, and his brother, John Scott Duffy, was a zombie. T. at 143, 145. Melanie Willman was "Fiona," and her nineteen year old daughter, Ellen Willman, whose honor Shrek attempted to protect, was not in costume. T. at 103-104. The bar owner was dressed as Howie Mandel, and several patrons were dressed as SWAT officers, a blue M&M, and "Chris Farley." T. at 115, 161, 174, 177, 182, 214. Appellant was not in costume. T. at 397. The evidence established that all of the partygoers had been enjoying the party, drinking beer, for several hours. T. at 109, 144, 212, 398.

{¶12} Appellant argues the victim was the aggressor and created the confrontation. He further argues the evidence supports the fact that he had a bona fide belief that he was in imminent danger, and he had no duty to retreat.

{¶13} Appellant testified the victim "smacked me three times***[i]n the face, left side," without saying anything. T. at 402, 436. Appellant then confronted the victim and asked him "what his problem was, why he was smacking me, he told me he smacks little bitches like me everyday." T. at 403. The victim then told appellant he would smack him again and appellant said "I bet you won't." Id. When the victim raised his hand to smack appellant again, appellant was in "fear of my life, I hit him one time." Id. Appellant confronted the victim to "see what his problem was, what was the reason he smacked me because he never said anything to me, he just reached over and smacked me without saying anything." T. at 436.

{¶14} Appellant presented the testimony of four witnesses, two of which were his brother, Bobby Ramey, and his brother's girlfriend, Brittiney Johnson. Both testified about the attack on appellant outside after he left the bar. T. at 356, 376-380. All the testimony established that after appellant struck the victim, appellant immediately beat a hasty retreat. T. at 113, 128-129, 134, 147, 181.

{¶15} The victim testified appellant "was aggressively making advances, you know, flirtations, annoying the two younger girls that were sitting there at the bar with me. And I stretched - - reached over and grabbed him by the shoulder and asked him, you know, hey, you know, stop bothering the girls, they're not interested, leave them alone, that kind of thing." T. at 147. Appellant then walked over to the jukebox and on his way back, tapped the victim on the shoulder and asked him what he meant by that. Id. The victim said, "well you were bothering the girls. And he [appellant] said, no, what did you mean by that. And before I could say another word, that's when I got punched

in the middle of my face, broke my nose, and I got about 14 stitches." Id. The victim stated he never slapped or hit appellant, and never threatened him. T. at 150.

{¶16} Ellen Willman testified she was annoyed by appellant's advances and the victim realized she was being bothered by appellant. T. at 108, 110. She stated the victim never smacked appellant or threatened a blow; he just told appellant to leave her alone. T. at 110-111. Several witnesses, including appellant himself, testified appellant walked away from the bar area and the girls before returning to confront the victim. T. at 118, 147, 352-354, 415-416.

{¶17} We note the weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison* (1990), 49 Ohio St.3d 182, certiorari denied (1990), 498 U.S. 881. The trier of fact "has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger,* 77 Ohio St.3d 415, 418, 1997-Ohio-260.

{¶18} Compounding all the events was the fact that everyone was drinking beer, including appellant who admitted to engaging in a chugging contest. T. at 398. The victim was 6'5" and most nights, he's "the biggest guy in the bar." T. at 143, 157. Appellant was 5'9" and 135 pounds. T. at 401. Appellant testified he was afraid and intimidated by the victim because of his size. T. at 434. Despite this fact, appellant approached the victim to "confront him and get things settled." T. at 433. This occurred after a lapse of time wherein appellant first walked over to the jukebox and played some songs. T. at 147, 150, 156.

{¶19} There is considerable testimony as to what happened after the victim was struck, which is conflicting as to motive. Appellant paints it as a "gang" seeking revenge while the witnesses claim they were only trying to stop appellant from leaving.

{¶20} The jury is the ultimate determiner of fact as to whether the defense of self-defense has been established. There was ample testimony to support the conclusion that the victim was not the initiator and appellant purposefully revisited a resolved situation and punched the victim with no provocation. The jury chose to accept the testimony of the victim and Ellen Willman over appellant.

{¶21} Upon review, we fail to find that the jury lost its way.

{¶22} Assignment of Error I is denied.

II

{¶23} Appellant claims he was denied effective assistance of trial counsel because his counsel did not convey to him a plea offer made by the state, and argued appellant had no duty to retreat in arguing the affirmative defense of self-defense. We disagree.

{¶24} The standard this issue must be measured against is set out in *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraphs two and three of the syllabus, certiorari denied (1990), 497 U.S. 1011. Appellant must establish the following:

{¶25} "2. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. (*State v. Lytle* [1976], 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623;

Strickland v. Washington [1984], 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, followed.)

{¶26} "3. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different."

{¶27} First, appellant claims his counsel was deficient in not telling him of the state's plea offer. App.R. 9(A) states, "[t]he original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court shall constitute the record on appeal in all cases." The record on appeal does not reflect any offer made by the state. The letter from the prosecutor's office attached to appellant's supplemental brief is dehors the record and cannot be considered.

{¶28} Secondly, appellant claims his counsel was deficient because he argued during the trial and in the proposed jury instruction that appellant had no duty to retreat.

{¶29} Defense counsel argued self-defense because appellant did not initiate the incident, was slapped first by the victim, and later had a hand raised against him. Defense counsel argued appellant's actions arose out of self-defense, not as the initial provocateur. T. at 476. Defense counsel did not argue the duty to retreat, but maintained appellant was protecting himself against the victim and the patrons chasing him outside the bar. T. at 475-477. In fact, defense counsel was successful as illustrated by the jury's finding of not guilty on three counts.

{¶30} Upon review, we do not find any ineffective assistance of counsel.

{¶31} Assignment of Error II is denied.

{¶32} The judgment of the Court of Common Pleas of Delaware County, Ohio is hereby affirmed.

By Farmer, J.

Edwards, P.J. and

Delaney, J. concur.

__S/ Sheila G. Farmer_____

__S/ Julie A. Edwards_____

_S/ Patricia A. Delaney_____

JUDGES

SGF/sg 506

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
DANIEL J.M. RAMEY	:	
Defendant-Appellant	:	CASE NO. 09CAA090081

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Delaware County, Ohio is affirmed. Costs to appellant.

__S/ Sheila G. Farmer_____

__S/ Julie A. Edwards_____

_S/ Patricia A. Delaney_____

JUDGES