**[Cite as *State v. Garner*, 2010-Ohio-3891.]**

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| STATE OF OHIO<br><br>Plaintiff-Appellee<br><br>-vs-<br><br>MARCUS A. GARNER<br><br>Defendant-Appellant | JUDGES:<br>Hon. Julie A. Edwards, P.J.<br>Hon. W. Scott Gwin, J.<br>Hon. William B. Hoffman, J.<br><br>Case No. 2009CA00286<br><br>O P I N I O N |

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| CHARACTER OF PROCEEDING: | Appeal from the Stark County Court of Common Pleas, Case No. 2009CA0855 |
| JUDGMENT: | Affirmed |
| DATE OF JUDGMENT ENTRY: | August 16, 2010 |

APPEARANCES:

| For Plaintiff-Appellee | For Defendant-Appellant |
|---|---|
| JOHN D. FERRERO,<br>PROSECUTING ATTORNEY,<br>STARK COUNTY, OHIO<br><br>BY: RENEE M. WATSON<br>Assistant Prosecuting Attorney<br>Appellate Section<br>110 Central Plaza, South – Suite 510<br>Canton, Ohio 44702-1413 | BERNARD L. HUNT<br>2395 McGinty Rd NW<br>North Canton, Ohio 44720 |

*Hoffman, J.*

**{¶1}** Defendant-appellant Marcus A. Garner appeals his conviction in the Stark County Court of Common Pleas on one count of voluntary manslaughter, with a firearm specification, and one count of having weapons under disability. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

**{¶2}** On May 21, 2009, Appellant visited a bar known as The Spot in Canton, Ohio. At the bar, Appellant got into a heated argument with Monaray Jones and Daryle Bryant about something that had occurred the week before. Monaray Jones left the patio area of the bar and walked back into the bar. Appellant followed. A fight then erupted inside the bar between Appellant and Jones. Bryant observed Appellant throw a chair and saw him fighting with a number of people. The bar's bouncers broke up the fight and made the participants leave the bar.

**{¶3}** Outside of the bar, Quinn Bradley witnessed Appellant and Jones arguing in the parking lot. She saw Appellant with a gun, but did not see Jones with a gun. She saw Jones backing away from Appellant with his hands up and telling Appellant to put the gun down. Appellant then shot into the air once and then again at Jones' feet. Following the second shot, Appellant turned around and walked back toward the bar. As he did, Jones obtained a gun and returned fire. Appellant shot back, shooting Jones in the face. Appellant then got on his motorcycle and fled the scene. Jones died as a result of his injuries.

**{¶4}** Appellant was subsequently arrested and charged with one count of voluntary manslaughter with a firearm specification and one count of having weapons

under disability. Following a jury trial, Appellant was found guilty of the charges. The trial court sentenced Appellant to ten years for voluntary manslaughter, three years for the gun specification and two years for having a weapon under disability. The sentences were to run consecutively for a total of fifteen years incarceration.

**{¶5}** Appellant now appeals, assigning as error:

**{¶6}** "I. THE TRIAL COURT COMMITTED ERROR WHEN IT DENIED THE APPELLANT'S MOTION TO INSTRUCT THE JURY ON SELF DEFENSE.

**{¶7}** "II. THE CONVICTION OF THE APPELLANT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE PRESENTED AT TRIAL.

**{¶8}** "III. THE TRIAL COURT ERRED IN NOT GRANTING THE APPELLANT'S MOTION FOR A CRIMINAL RULE 29 ACQUITTAL.

**{¶9}** "IV. THE APPELLANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL."

I.

**{¶10}** In the first assignment of error Appellant maintains the trial court committed error in failing to instruct the jury on self-defense.

**{¶11}** A trial court must fully and completely give all jury instructions that are relevant and necessary for the jury to weigh the evidence and to discharge its duty as the factfinder. *State v. Comen* (1990), 50 Ohio St.3d 206, 553 N.E.2d 640, paragraph two of the syllabus. In examining the trial court's jury instructions we must review the court's charge as a whole, not in isolation, in determining whether the jury was properly instructed. *State v. Burchfield* (1993), 66 Ohio St.3d 261, 262, 611 N.E.2d 819.

**{¶12}** In order to warrant an instruction on self defense, the test applied is whether the defendant has introduced evidence which if believed, is sufficient to raise a question in the minds of reasonable persons concerning the existence of the issue. *State v. Melchior* (1978), 56 Ohio St.2d 15. On review, the proper standard is whether the trial court's refusal to give a requested instruction constituted an abuse of discretion under the facts and circumstances of the case. A trial court does not abuse its discretion by refusing to give a jury instruction if evidence is insufficient to warrant the requested instruction. *State v. Teets*, 2009-Ohio-6083.

**{¶13}** The Ohio Jury Instruction for self-defense against danger of death or great bodily harm provides, in part:

**{¶14}** "2. SELF-DEFENSE. The defendant claims to have acted in self-defense. To establish a claim of self-defense, the defendant must prove by the greater weight of the evidence that

**{¶15}** "(A) he/she was not at fault in creating the situation giving rise to *(describe the event in which death or injury occurred);* and

**{¶16}** "(B) he/she had reasonable grounds to believe and an honest belief, even if mistaken, that he/she was in (imminent) (immediate) danger of death or great bodily harm, and that his/her only reasonable means of (retreat) (escape) (withdrawal) from such danger was by the use of deadly force; and

**{¶17}** "(C) he/she had not violated any duty to (retreat) (escape) (withdraw) to avoid the danger." 4 Ohio Jury Instructions (2006), Section 411.31.

**{¶18}** Regarding the elements of "deadly force" self-defense, the Supreme Court of Ohio has held:

**{¶19}** "To establish [deadly force] 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. Barnes* (2002), 94 Ohio St.3d 21, 24, citing *State v. Robbins* (1979), 58 Ohio St.2d 74, paragraph two of the syllabus.

**{¶20}** At trial, Appellant argued to the jury the case was about mistaken identity, not self defense. Further, numerous witnesses testified they witnessed Appellant brandish a gun, point it at Jones and make intimidating statements. The testimony established Appellant brandished and shot his gun first.

**{¶21}** The witnesses all stated Jones did not initially have a gun at the time Appellant made the intimidating and instigating statements. At trial, Quinn Bradley testified:

**{¶22}** "Q. And when you exited the bar who was out there?

**{¶23}** "A. Lot of people that was in the bar went outside. And I was going toward my car. I was walking towards my car and my friend was supposed to have been coming, but she had liked pulled up kind of late, like after I was gone. I was just going to my car. It was just people from the bar and I seen Marcus and Monaray.

**{¶24}** "Q. You see Marcus. What was he doing?

**{¶25}** "A. He had a gun pointed up to Monaray.

**{¶26}** "Q. And this other person that he had the gun pointed to, did they have - - did you see them with a gun?

**{¶27}** "A. No, I didn't.

**{¶28}** "* * *

**{¶29}** "Q. Did you hear them say anything?

**{¶30}** "A. I heard Marcus talking.

**{¶31}** "Q. Do you remember what he said?

**{¶32}** "A. Something about you being scared or something.

**{¶33}** "Q. He was saying that to the person he was pointing the gun at?

**{¶34}** "A. Yes.

**{¶35}** "Q. After he got done saying you being scared, pointing this gun at this person, what happened?

**{¶36}** "A. I seen him shoot at the ground.

**{¶37}** Tr. at 26-27.

**{¶38}** Daryle Bryant testified:

**{¶39}** "Q. What did you see when you catch up to Monaray outside?

**{¶40}** "A. Him and Marcus was still arguing.

**{¶41}** "Q. What is being said?

**{¶42}** "A. Really I don't know. He was just talking stuff to Monaray or whatever.

**{¶43}** "Q. And what else happened?

**{¶44}** "A. Then when he was talking stuff he had his gun out talking stuff. Monaray was just backing up. We was telling him put the gun down or whatever. And he never put the gun out or whatever. And he started talking back to Monaray and whatever. That's when he shot towards Monaray's leg, foot or something or whatever.

And was just talking mess to him or whatever and he shot again like in the air or something.

**{¶45}** "Q. What did Monaray do after the first shot?

**{¶46}** "A. He just back up like this with his hands up.

**{¶47}** "Q. And you said you saw - - how close were you to both Monaray and the Defendant when this was going on?

**{¶48}** "A. I was like behind him. Behind him, but I was like on the side of the truck.

**{¶49}** "Q. When you say behind him, do you mean Monaray or Marcus?

**{¶50}** "A. I was behind both of them. Both was in front of me or whatever.

**{¶51}** "Q. Did you - - were you able to see what was going on?

**{¶52}** "A. Yeah.

**{¶53}** "Q. And after that shot to the ground what did Marcus do, the Defendant do next?

**{¶54}** "A. He ended up turned around like walking towards the front of the bar area or whatever. I guess he was about to get on his motorcycle and leave and stuff.

**{¶55}** "Q. Then what happened?

**{¶56}** "A. That's when Monaray comes out with his gun and like runs like across from him and he like shot back at his foot or whatever he shot at, whatever. That's when Marcus turned around and shot back and in the midst of that Monaray ended up getting hit.

**{¶57}** "Q. And so now Monaray has a gun and he fires and how many shots did he fire?

**{¶58}** "A. I couldn't even tell you. Probably like couple shots or something, I think.

**{¶59}** "Q. Were you able to see what Marcus did, the Defendant? Did you see him fire another shot?

**{¶60}** "A. Yes.

**{¶61}** "Q. Did you see what happened to - - how did this all end?

**{¶62}** "A. All end with Monaray getting shot. It was the end."

**{¶63}** Tr. at 53-55.

**{¶64}** Brandon Isles testified:

**{¶65}** "Q. Did you see the Defendant outside?

**{¶66}** "A. Yes.

**{¶67}** "Q. What is he doing?

**{¶68}** "A. He got a gun in his hand chasing Monaray around.

**{¶69}** "Q. So when you get outside do you see the Defendant and Monaray saying anything to each other?

**{¶70}** "A. Just arguing back and forth, Monaray backing up.

**{¶71}** "Q. So Monaray is backing up. You see anything - - did Monaray have a gun at this time?

**{¶72}** "A. I didn't see him pull no gun at that time, no.

**{¶73}** "Q. So you see the Defendant and he has a gun?

**{¶74}** "A. Yes.

**{¶75}** "Q. Did he say anything to Monaray?

**{¶76}** "A. I guess he said like you ain't got no gun on you, right, or what's up or something like.

**{¶77}** "Q. What's Monaray doing?

**{¶78}** "A. Just backing up holding his hands up.

**{¶79}** "Q. What happens next?

**{¶80}** "A. I just hear a shot, shot at his legs or something like that.

**{¶81}** "Q. You said you hear a shot. Did you see him the Defendant shoot?

**{¶82}** "A. Yes.

**{¶83}** "Q. What does Monaray do?

**{¶84}** "A. Just back up and run towards like the trash cans like back there.

**{¶85}** "Q. You were pointing to?

**{¶86}** "A. Like he ran like back there (indicating).

**{¶87}** "Q. What does the Defendant do?

**{¶88}** "A. After he like shoots I guess he walks back up to the front.

**{¶89}** "Q. You see him walk up or did you just - -

**{¶90}** "A. I didn't see nothing. I heard a shot, just like duck, try to get out the way.

**{¶91}** "Q. What's the next thing you see - - that you saw happen?

**{¶92}** "A. I saw Monaray come up with a gun and start shooting.

**{¶93}** "Q. Did you see who he's shooting at?

**{¶94}** "A. Yes.

**{¶95}** "Q. Who was that?

**{¶96}** "A. Mr. Garner.

**{¶97}** "Q. Where are you at in the parking lot?

**{¶98}** "A. Like behind the truck.

**{¶99}** "Q. That's the vehicle that you say is approximately by the white car on that photo?

**{¶100}** "A. Yes.

**{¶101}** "Q. Do you know where Monaray got this gun?

**{¶102}** "A. No.

**{¶103}** "Q. What did you see happen as Monaray is shooting?

**{¶104}** "A. I just seen Mr. Garner shoot back and I duck again, look back up. I don't see Monaray standing no more.

**{¶105}** "Q. Where was Monaray?

**{¶106}** "A. Like right here (indicating).

**{¶107}** "Q. Did you go over to him?

**{¶108}** "A. Yes.

**{¶109}** "Q. And what was the condition of Monarary?

**{¶110}** "A. All I seen was blood dripping from his head and he had like pieces of his face on his shirt. I just thought he was gone, he was dead."

**{¶111}** Tr. at 114-117.

**{¶112}** Based upon the above, we find the trial court did not abuse its discretion in not instructing the jury as to self defense. The evidence demonstrates Appellant was at fault in creating the situation giving rise to the shooting of Monaray Jones.

**{¶113}** The first assignment of error is overruled.

II., III.

**{¶114}** Appellant's second and third assignments of error raise common and interrelated issues; therefore, we will address the arguments together.

**{¶115}** Appellant argues the trial court erred in denying his Criminal Rule 29 motion for acquittal, and his conviction is against the manifest weight and sufficiency of the evidence. Specifically, Appellant asserts he acted in self-defense and the State's witnesses lacked credibility.

**{¶116}** In determining whether a trial court erred in overruling an appellant's motion for judgment of acquittal, the reviewing court focuses on the sufficiency of the evidence. See, e.g., State v. Carter (1995), 72 Ohio St.3d 545, 553, 651 N.E.2d 965, 974; State v. Jenks (1991), 61 Ohio St.3d 259 at 273, 574 N.E.2d 492 at 503.

**{¶117}** When reviewing the sufficiency of the evidence, our inquiry focuses primarily upon the adequacy of the evidence; that is, whether the evidence, if believed, reasonably could support a finding of guilt beyond a reasonable doubt. See *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541, 546 (stating, "sufficiency is the test of adequacy"); *State v. Jenks* (1991), 61 Ohio St.3d 259 at 273, 574 N.E.2d 492 at 503. The standard of review is whether, after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560; Jenks, 61 Ohio St.3d at 273, 574 N.E.2d at 503.

**{¶118}** Weight of the evidence addresses the evidence's effect of inducing belief. *State v. Wilson*, 713 Ohio St.3d 382, 387-88, 2007-Ohio-2202 at ¶ 25-26, 865 N.E.2d

1264, 1269-1270. An appellate court may not merely substitute its view for that of the jury, but must find that "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. Thompkins*, supra, 78 Ohio St.3d at 387, 678 N.E.2d 541. (Quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720-721). Accordingly, reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." *State v. Thompkins*, supra.

**{¶119}** Again, numerous witnesses testified at trial in this matter Appellant was the aggressor in the altercation outside the bar. Appellant brandished a gun, and Jones was not seen with a gun. Appellant made intimidating and instigating remarks to Jones, who had his hands in the air. Appellant shot his gun first, and subsequently shot and killed Jones.

**{¶120}** Based upon the testimony and our analysis set forth in our disposition of Appellant's first assignment of error, we find the state presented sufficient evidence from which a jury could conclude, beyond a reasonable doubt, Appellant committed the offenses with which he was charged.

**{¶121}** The second and third assignments of error are overruled.

IV.

**{¶122}** Appellant's fourth assignment of error asserts he was denied the effective assistance of counsel at trial in this matter. Specifically, Appellant maintains counsel was ineffective in failing to call witnesses or provide evidence in support of Appellant's claim he acted in self defense.

**{¶123}** A claim of ineffective assistance of counsel requires a two-prong analysis. The first inquiry is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to appellant. The second prong is whether the appellant was prejudiced by counsel's ineffectiveness. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. In determining whether counsel's representation fell below an objective standard of reasonableness, judicial scrutiny of counsel's performance must be highly deferential. *Bradley* at 142, 538 N.E.2d 373. Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any given case, a strong presumption exists counsel's conduct fell within the wide range of reasonable professional assistance. Id.

**{¶124}** In order to warrant a reversal, the appellant must additionally show he was prejudiced by counsel's ineffectiveness. “Prejudice from defective representation sufficient to justify reversal of a conviction exists only where the result of the trial was unreliable or the proceeding fundamentally unfair because of the performance of trial counsel.” *State v. Carter* (1995), 72 Ohio St.3d 545, 558, 651 N.E.2d 965, citing *Lockhart v. Fretwell* (1993), 506 U.S. 364, 370, 113 S.Ct. 838, 122 L.Ed.2d 180.

**{¶125}** The United States Supreme Court and the Ohio Supreme Court have held a reviewing court “need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.” *Bradley* at 143, 538 N.E.2d 373, quoting *Strickland* at 697.

**{¶126}** Appellant does not specify the evidence or witness testimony counsel failed to submit to demonstrate he acted in self-defense. Appellant's brief states "If the Appellant had testified on this point, reasonable minds could have determined that the instruction was proper." However, this argument relies upon evidence outside the record and not properly before this Court; therefore, Appellant has not demonstrated prejudice as a result of the alleged error.

**{¶127}** Based upon the above and our analysis and disposition of Appellant's first three assignments of error, we overrule the fourth assignment of error.

**{¶128}** Appellant's conviction in the Stark County Court of Common Pleas is affirmed.

By: Hoffman, J.

Edwards, P.J. and

Gwin, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

s/ W. Scott Gwin
HON. W. SCOTT GWIN

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| STATE OF OHIO | : | |
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| Plaintiff-Appellee | : | |
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| -vs- | : | JUDGMENT ENTRY |
| | : | |
| MARCUS A. GARNER | : | |
| | : | |
| Defendant-Appellant | : | Case No. 2009CA00286 |

For the reasons stated in our accompanying Opinion, Appellant's conviction in the Stark County Court of Common Pleas is affirmed. Costs assessed to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

s/ W. Scott Gwin
HON. W. SCOTT GWIN