[Cite as *In re S.D.*, 2015-Ohio-1170.]

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
S.D.	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
	:	
	:	
	:	Case No. 14CA19
	:	
	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Juvenile Division, Case No. 214-1119
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	March 26, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOSEPH D. SAKS 117 East High Street Suite 234 Mount Vernon, OH 43050	JOHN A. DANKOVICH 11East High Street Mount Vernon, OH 43050

Farmer, J.

{¶1} On April 25, 2014, appellant, S.D., age fourteen at the time, was charged with being a delinquent child by way of one count of felonious assault in violation of R.C. 2903.11. Said charge arose from an after-school altercation between S.D. and the victim, S.T.

{¶2} An adjudicatory hearing was held on August 4, 2014. By journal entry filed September 5, 2014, the trial court found appellant guilty of the offense.

{¶3} A dispositional hearing was held on September 17, 2014. By judgment entry filed September 24, 2014, the trial court ordered appellant to serve ninety days in a detention facility and a one year commitment to the Department of Youth Services, all suspended conditioned on appellant obeying all conditions of probation and committing no further violations.

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

I

{¶5} "THE TRIAL COURT ABUSED ITS DISCRETION IN APPLYING THE BURDEN AND STANDARDS OF PROOF."

II

{¶6} "THE TRIAL COURT ERRED IN FINDING MS. [D.] AT FAULT."

III

{¶7} "THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT S.D. USED GOSSLY DISPROPOTIONATE (SIC) FORCE."

I, II, III

{¶8} Appellant challenges the trial court's decision that she did not prove the affirmative defense of self-defense. Appellant claims the trial court abused its discretion in applying an improper burden and standard of proof, erred in finding her at fault, and abused its discretion in finding she used grossly disproportionate force. We disagree.

{¶9} In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore,* 5 Ohio St.3d 217 (1983).

{¶10} 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,* 49 Ohio St.3d 182 (1990). 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.

{¶11} "A reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not." *Seasons Coal Company, Inc. v. Cleveland,* 10 Ohio St.3d 77, 81 (1984).

{¶12} In *State v. Martin,* 21 Ohio St.3d 91 (1986), syllabus, the Supreme Court of Ohio held the following: "R.C. 2901.05 requires the prosecution to prove beyond a reasonable doubt every element of a homicide offense as defined by statute, and does not require the defendant to disprove an essential element of this offense. The state

may constitutionally require a defendant to prove, by a preponderance of the evidence, the affirmative defense of self-defense."

{¶13} R.C. 2901.05 states the following in pertinent part:

> Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.[1]

{¶14} As explained by this court in *State v. Hoopingarner,* 5th Dist. Tuscarawas No. 2010AP 07 00022, 2010-Ohio-6490, ¶ 31:

> To establish self-defense in the use of non-deadly force, the accused must show that (1) he was not at fault in creating the situation giving rise to the altercation; (2) that he had reasonable grounds to believe and an honest belief, even though mistaken, that some force was necessary to defend himself against the imminent use of unlawful force, and (3) the force used was not likely to cause death or great bodily harm. *State v. Vance,* Ashland App. No.2007–COA–035, 2008–Ohio–4763 at ¶

[1]In the case cited by appellant, *State v. Melchior,* 56 Ohio St.2d 15 (1978), the Supreme Court of Ohio reviewed a prior version of R.C. 2901.05(A) which did not include the "burden of proof" language for an affirmative defense.

77. (Citing: *In Re: Maupin* (Dec. 11, 1998), Hamilton App. No. C–980094, unreported; *Columbus v. Dawson* (1986), 33 Ohio App.3d 141, 142, 514 N.E.2d 908; R.C. 2901.05(A); *State v. Walker* (Feb. 20, 2001), Stark App. No.2000CA00128). If any one of these elements is not proven by a preponderance of the evidence, the theory of self-defense does not apply. *State v. Williford* (1990), 49 Ohio St.3d 247, 551 N.E.2d 1279.

{¶15} We find the trial court used the correct standard of proof for self-defense in its journal entry filed September 5, 2014:

To prevail on a non-deadly-force affirmative defense, one must show by a preponderance of the evidence that he was not at fault in creating the situation. In this situation Ms. [D.] testified that Ms. [T.] came up from behind her, grabbed her hair, and hit her. However, this testimony is not consistent with the rest of the evidence submitted in this case. The evidence shows that Ms. [T.] did approach Ms. [D.] from behind but went around her and confronted her on the side walk. This confrontation caused Ms. [D.] to stop walking and there was an apparent exchange of words but no evidence that Ms. [T.] had yet touched Ms. [D.] in any manner. Two witnesses testified that Ms. [D.] then struck Ms. [T.] first. Two other witnesses testified that [the] fight started simultaneously. Only Ms. [D.] said that Ms. [T.] hit her first. The Court, therefore,

> concludes the preponderance of the evidences shows that Ms. [D.] was at fault for creating this situation.
>
> The Court understands that in all probability there would have been no fight on this particular day between these two girls if Ms. [T.] had not confronted Ms. [D.]. The Court also understands that Ms. [D.] may not have had a duty to retreat from this confrontation. However, bad behavior by Ms. [T.] and the right to "stand your ground" does not legally justify striking the first blow under the facts in this case.

{¶16} In order to understand the evidence, it is necessary to set the scene of the offense and the various participants. The victim, S.T., sixteen years old at the time of the hearing, together with her brother and her friends P.S., M.J., J.C., and D.S., were walking home after school, following appellant and her boyfriend. T. at 11, 17, 46, 63, 73, 83. Both M.J. and the brother approached appellant's boyfriend, taunting him and/or taking a swing at him. T. at 18, 45, 67, 83. Thereafter, appellant got in the brother's face causing S.T. to run up and approach appellant. T. at 13, 18, 45-46, 64. All the witnesses agree to this scenario.

{¶17} A discrepancy arises as to who took the first swing and who grabbed whose hair first. T. at 14, 46-47, 66, 73-74, 83-84. Appellant claims the victim took the first swing and the victim and P.S. claim appellant took the first swing. T. at 46-47, 66, 83-84. A bus driver who witnessed the altercation some fifty feet away opined "they mutually grabbed ahold (sic) of each other" and "they both mutually latched on together." T. at 73-74, 78. A video of the fight was taken by J.C., but does not show the

beginning of the fight or who the aggressor was. T. at 11-12; State's Exhibit 2. J.C. opined "the alleged delinquents went at each other at the exact same time. I don't believe one or the other instigated the fight sole-handedly." T. at 14.

{¶18} In reviewing all of the evidence, the trial court determined appellant was the aggressor, taking the first swing and taking the victim to the ground and substantially beating her up, causing the victim to sustain a broken nose in two places, a black eye, and anxiety. T. at 51, 54.

{¶19} In accepting the trial court's determination on the credibility of the various witnesses, appellant was the aggressor thereby negating her claim of self-defense. Further, although the first act was an altercation between appellant's boyfriend and the victim's brother, no evidence was presented to substantiate that appellant was in defense of another.

{¶20} As for the arguments on the trial court abusing its discretion in finding appellant used "grossly disproportionate force," we find the trial court did not make a specific finding on this issue in its judgment entry filed September 5, 2014. After setting out the evidence against appellant and then favorable to appellant, the trial court stated: "This presents the Court with a close legal question. Was the level of force just disproportionate or was it grossly disproportionate? Was the force used necessary or did it go beyond necessary? However, the burden of proof for an affirmative defense is upon Ms. [D.] and the Court does not believe she has provided enough proof to support her defense."

{¶21} We find the trial court did not make a specific determination on the issue of "grossly disproportionate force" as it had already determined that appellant "was at

fault for creating this situation" and therefore not entitled to claim the affirmative defense of self-defense.

{¶22} Assignments of Error I, II, and III are denied.

{¶23} The judgment of the Court of Common Pleas of Knox County, Ohio, Juvenile Division is hereby affirmed.

By Farmer, J.

Hoffman, P.J. and

Delaney, J. concur.

SGF/sg