[Cite as *State v. Gamm*, 2017-Ohio-578.]

WCOURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- FRANK E. GAMM Defendant-Appellant	JUDGES: Hon. W. Scott Gwin, P. J. Hon. William B. Hoffman, J. Hon. John W. Wise, J. Case No. 16 COA 022 O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 16 CRI 013
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	January 30, 2017

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
CHRIS BALLARD ASSISTANT PROSECUTOR 110 Cottage Street Ashland, Ohio 44805	MATTHEW J. MALONE LAW OFFICES OF MATTHEW J. MALONE 10 East Main Street Ashland, Ohio 44805

Wise, J.

{¶1} Appellant, Frank E. Gamm, was convicted following a jury trial on one count of Attempted Murder, in violation of R.C. 2903.02(A), a felony of the first degree, with a firearm specification and one count of Felonious Assault, in violation of R.C. 2903.11(A)(2), a felony of the second degree, also with a firearm specification.

{¶2} The charges arose out of an altercation which occurred at the residence where Appellant and the victim were both living. The testimony relevant to this appeal is as follows:

{¶3} Christopher Ginn testified that he began living with his girlfriend, Bethann Bryant, at Bryant's mother's house early November, 2015. (T. at. 33-34). Bryant's mother, Debra Matz ("Matz"), had lived at the residence for more than 20 years. (T. at. 315). Appellant Gamm, like Ginn, had also moved into Matz' residence in November, 2015. (T. at 103, 317). By all accounts, Ginn and Gamm did not get along well. (T. at 37-38, 104, 167, 318, 357-358). Ginn claimed that on the night of January 31, 2016, Appellant stood up from the couch and shot Ginn in the bicep as Ginn walked into the living room. (T. at 47, 52). Ginn yelled for Bryant, who had been in the kitchen with Matz. (T. at 50). Bryant punched Appellant in the face and then tended to Ginn. (T. at 57). Ginn was then transported to the hospital to treat his injuries. T. at 59). Ginn denied attempting to injure Appellant at any time that evening. (T. at 62, 87). He also denied having an ice pick, can opener, or other object in his hands as he walked into the living room. (T. at 75-76).

{¶4} Bryant testified that early in the day on January 31, 2016, Ginn and Appellant got into an argument over the repair of Matz' car tires. (T. at 109-110). Later that evening, Bryant was in the kitchen with Matz when Ginn walked in to tell her good

night. (T. at 111). Soon after Ginn left the kitchen, Bryant heard a gunshot. (T. at 112). She ran into the living room where she saw Ginn with a gunshot wound and Appellant standing there holding a gun. *Id*. She proceeded to punch Appellant in the mouth, call 911, and call the neighbors. (T at 113-114). Bryant could not see Ginn or Appellant when the shot was fired. (T. at 117, 124). Like Ginn, Bryant stated that she did not recall an ice pick or other metal object being present that night. (T. at 129).

{¶5} Matz testified that on January 31, 2016, she also heard Ginn and Appellant argue about her car. (T. at 331). She also stated that she could not see Appellant when he shot Ginn, but she did observe Appellant sitting on the couch following the shooting. (T. at 323, 342). Matz claimed she later found a can opener under furniture near where Ginn had been laying after he was shot. (T. at 327).

{¶6} Appellant also testified in his own defense. He testified that on the night that he shot Ginn, Ginn had taken a swing at him and brushed his cheek. (T. at 362, 365, 392). Later in the evening, Ginn approached Appellant, yelling and wielding what Appellant thought was an ice pick. (T. at 375). Appellant then shot Ginn. (T. at 375). Appellant testified that he did so in self-defense and that he had been sucker punched by Ginn earlier that evening. (T. at 380, 408).

{¶7} Law enforcement officers testified that Appellant made the same allegations on the night of the shooting. (T. at 247, 252).

{¶8} Following the close of evidence, the trial court instructed the jury regarding self-defense as follows:

> 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 he was not at fault in creating the situation giving rise to the event in which death or injury occurred or could have occurred and he

> had reasonable grounds to believe and an honest belief, even if mistaken, that he was in imminent or immediate danger of death or great bodily harm and that his only reasonable means of escape from such danger was by the use of deadly force
>
> .
>
> A person who lawfully is in his residence has no duty to retreat before using force in self-defense or in defense of his residence. Any person who lawfully is an occupant of his vehicle or lawfully is an occupant of a vehicle owned by his immediate family member has no duty to retreat before using force in self-defense.
>
> Words alone do not justify the use of deadly force. Resort to such force is not justified by abusive language, verbal threats or other words, no matter how provocative.
>
> In deciding whether the Defendant had reasonable grounds to believe and an honest belief that he was in imminent or immediate danger of death or great bodily harm, you must put yourself in the position of the Defendant with his characteristics, his knowledge or lack of knowledge and under the .circumstances and conditions that surrounded him at the time You must consider the conduct of Christopher Ginn and decide whether his acts and words caused the Defendant to reasonably and honestly believe that he was about to be killed or receive great bodily harm.

{¶9} (T. at 504-505).

{¶10} Appellant's counsel objected to the jury instruction. (T. at 431-434).

{¶11} The jury returned guilty verdicts on both the attempted murder and felonious assault charge, as well as the firearm specifications on both counts.

{¶12} At sentencing, the trial court merged the felonious assault count with the attempted murder count and sentenced Appellant to seven years, plus a mandatory three years on the firearm specification, to run consecutively. Appellant filed a timely notice of appeal.

{¶13} Counsel for Appellant has filed a Motion to Withdraw and a brief pursuant to *Anders v. California,* 386 U.S. 738 (1967), rehearing denied, 388 U.S. 924 (1967), indicating that the within appeal was wholly frivolous. Counsel for Appellant has raised

one potential assignment of error asking this Court to determine whether the trial court erred in giving the standard jury instruction on self-defense. Appellant was given an opportunity to file a brief raising additional assignments or error but none was filed.

I.

{¶14} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT INSTRUCTED THE JURY IN ACCORDANCE WITH OHIO'S PATTERN JURY INSTRUCTIONS ON SELF-DEFENSE."

{¶15} In *Anders,* the United States Supreme Court held if, after a conscientious examination of the record, a defendant's counsel concludes the case is wholly frivolous, then he should so advise the court and request permission to withdraw. *Id.* at 744. Counsel must accompany his request with a brief identifying anything in the record that could arguably support his client's appeal. *Id.* Counsel also must: (1) furnish his client with a copy of the brief and request to withdraw; and, (2) allow his client sufficient time to raise any matters that the client chooses. *Id.* Once the defendant's counsel satisfies these requirements, the appellate court must fully examine the proceedings below to determine if any arguably meritorious issues exist. If the appellate court also determines that the appeal is wholly frivolous, it may grant counsel's request to withdraw and dismiss the appeal without violating constitutional requirements, or may proceed to a decision on the merits if state law so requires. *Id.*

{¶16} Counsel in this matter has followed the procedure in *Anders v. California,* 386 U.S. 738 (1967).

{¶17} We will now address the merits of Appellant's potential Assignment of Error.

I.

{¶18} A defendant is entitled to have the trial court give complete and accurate jury instructions on all the issues raised by the evidence. *State v. Sneed* (1992), 63 Ohio St.3d 3, 9. In examining the 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.

{¶19} Under Ohio law, self-defense is an affirmative defense which a defendant must establish by a preponderance of the evidence. R.C. 2901.05(A); *State v. Martin,* 21 Ohio St.3d 91, 94, 488 N.E.2d 166 (1986). To prove self-defense, a defendant must prove three elements. The defendant must prove that he: (1) was not at fault in creating the situation that gave rise to the fight; (2) had a bona fide belief that he was in imminent danger of death or great bodily harm and that the use of force was his only means of escape; and (3) he did not violate any duty to retreat or avoid the danger. *State v. Williford* (1990), 49 Ohio St.3d 247, 249, citing *State v. Robbins* (1979), 58 Ohio St.2d 74, at paragraph two of the syllabus. Generally, one has a duty to retreat, if possible, before resorting to lethal force. *Id.* at 250. However, there is no duty to retreat from one's own home. *Id.*

{¶20} Appellant herein argues that the trial court abused its discretion when it instructed the jury in accordance with Ohio’s pattern jury instructions on self-defense as set forth above.

{¶21} In *State v. Thomas,* (1997) 77 Ohio St.3d 323, the Ohio Supreme Court held:

{¶22} "There is no duty to retreat from one's own home before resorting to lethal force in self-defense *against a cohabitant with an equal right to be in the home.*" (Emphasis added.) In that case, Thomas shot and killed Flowers, her live-in boyfriend. At trial, she admitted to shooting Flowers but claimed that she acted in self-defense based on battered woman's syndrome. The Court determined that the duty to retreat before resorting to lethal force does not apply to a person who is attacked in her home by someone else who also has equal rights to the home. *Id.* at 327–28.

{¶23} Based on *Thomas, supra*, we find the trial court's instruction was correct. The trial court properly instructed the jury that Appellant had no duty to retreat in his own residence.

{¶24} The proposed assignment of error is overruled.

{¶25} After independently reviewing the record, we agree with counsel's conclusion that no arguably meritorious claims exist upon which to base an appeal. Hence, we find the appeal to be wholly frivolous under *Anders,* grant counsel's request to withdraw, and affirm the judgment of the Court of Common Pleas of Ashland County, Ohio.

By: Wise, J.
Gwin, P. J., and
Hoffman, J., concur.

JWW/d 0123