

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-09-1280

Appellee

Trial Court No. CR-2009-1243

v.

David Abalos

**DECISION AND JUDGMENT**

Appellant

Decided: July 15, 2011

\* \* \* \* \*

Julia R. Bates, Lucas County Prosecuting Attorney, and  
Michael D. Bahner, Assistant Prosecuting Attorney, for appellee.

Neil S. McElroy, for appellant.

\* \* \* \* \*

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas that found appellant guilty of one count of assault in violation of R.C. 2903.13(A) and (C)(3), a misdemeanor of the first degree. For the reasons that follow, the judgment of the trial court is affirmed.

{¶ 2} The following relevant facts are undisputed. On February 23, 2009, appellant was indicted on three counts of aggravated robbery, two counts of robbery, two

counts of felonious assault and two counts of assault. The charges arose from an incident wherein appellant assaulted a Toledo police detective during a late-night altercation outside Scarlett's, a strip club in Toledo. Appellant, his brother, and several other males were at the strip club as part of a bachelor party which had started early that evening and included stops at several bars and restaurants in Toledo. Eventually, six of the charges against appellant were nollied and the case proceeded to trial on September 21, 2009, on the remaining three charges. On September 28, 2009, the jury returned verdicts of guilty as to the lesser included offense of misdemeanor assault, not guilty as to felony assault and not guilty as to aggravated robbery. Appellant was sentenced to 180 days incarceration with 90 days suspended; the incarceration portion of his sentence was suspended and appellant was ordered to serve 90 days work release.

{¶ 3} Appellant sets forth a single assignment of error:

{¶ 4} "Assignment of Error no. 1

{¶ 5} "The trial court erred to the prejudice of the defendant when it denied a request for a 'defense of others' jury instruction."

{¶ 6} In support of his sole assignment of error, appellant asserts that based on the evidence offered at trial, reasonable minds could have concluded that he legitimately used force against a police officer to defend his brother and that, therefore, the trial court should have granted his request for a jury instruction on "defense of others."

{¶ 7} The trial court heard testimony from Detectives Kenneth DeWitt, Jr. and Jeremy Carey as to the events that took place during the early morning hours of January 24, 2009. Detective DeWitt testified that he was working with the vice narcotics unit that night with Detective Carey, investigating an illegal gambling operation in Toledo. The detectives were working in plainclothes. When one of the individuals the detectives were observing went to Scarlett's at about 1:00 a.m., the detectives followed. After monitoring the individual's activity for a few minutes, the detectives concluded that the individual was there for nothing more than personal entertainment, so they decided to leave.

{¶ 8} As the detectives walked toward their car, DeWitt saw a small group of men standing in the parking lot. DeWitt then heard one of them yell, "Hey, you long-haired hippy mother-fucker." DeWitt assumed the comment was directed at him but kept walking toward his car. When the detective heard the man yell the same thing again, he turned and asked, "Were you talking to me?" and continued walking. Detective DeWitt identified appellant in court as the person who had yelled the obscenity at him. At that point, appellant began to walk toward the detectives. Another man, whom DeWitt identified in court as appellant's brother, Nicholas, stepped in front of appellant and appeared to be trying to calm appellant down. The detectives were standing by their car by that time. Nicholas continued to walk toward DeWitt, explaining that they were part of a bachelor party and had been drinking. Appellant continued to shout obscenities at DeWitt while the detective and Nicholas talked. When Nicholas stepped within an arm's

length of DeWitt, the detective displayed his badge and identified himself as a police officer. DeWitt told Nicholas that he needed to get his party together and leave.

{¶ 9} At that point, appellant "took a swing" at DeWitt from over his brother's shoulder. At the same time, someone hit and shoved DeWitt from behind. The pushing and shoving continued and DeWitt saw Detective Carey approaching from the other side of the car. DeWitt saw that Carey had his badge displayed and weapon drawn and was identifying himself as a police officer. DeWitt felt more blows to his head and somebody grabbed his badge out of his hand; people "swarmed" on top of him as he covered his head and tried to block the punches. DeWitt recalled seeing Carey fall to the ground, "covered up by individuals" who repeatedly punched him.

{¶ 10} DeWitt testified that when he realized the two officers were unable to control the situation he used his cell phone to call for assistance. As he tried to make the call, several men continued to punch him in the ribs and head. DeWitt was able to break away long enough to give his location to the police dispatcher. The detective heard comments such as "Fuck the police" and "He's calling for backup" but was unable to identify who was talking. After DeWitt made the call, he went to Carey and struggled with some of the men to get them away from his partner. The men in appellant's party then walked away and got in a white van. As DeWitt was getting into his car, one of the men ran up and pounded on the door before returning to the van. The detective then called in their location and a description of the van and license plate number. The detectives followed the van a short distance until several uniformed crews stopped the

vehicle. All of the men in the van were taken into custody and the detectives were taken to the hospital for treatment. DeWitt was treated for cuts, scrapes and bruises.

{¶ 11} Detective Carey's testimony as to the events surrounding the assault in the parking lot corroborated that of Detective DeWitt. Carey testified that he heard someone yell at DeWitt as they walked to their car. As they reached their car, Carey heard "commotion" and saw appellant "trying to get to Detective DeWitt." Carey did not get in the car because he could see that "there was a problem" with a "growing group of people" walking toward DeWitt, who was standing on the passenger's side of the car. Carey then saw his partner pull out his badge and identify himself as a police officer. The next thing Carey saw was one individual push DeWitt into the midst of the group of men. At that point, Carey ran to the front of the car, pulled his badge out and yelled at the crowd to "get off" DeWitt. The assault on DeWitt continued despite Carey's identifying himself as a police officer. Appellant's brother then turned to Carey and said, "Fuck you." DeWitt was "almost engulfed by people" who were punching and shoving him. Carey then reached into the car for his weapon and returned to the front of the vehicle, yelling again for the crowd to get away from DeWitt and get down on the ground. The detective testified that he had his badge in one hand and his gun in the other. At that point, appellant's brother came at Carey's gun with both hands. Carey then lowered his gun and tried to protect the weapon. Carey further testified that appellant and one of the other men tried to take his gun. The men were able to get their hands on the gun as Carey tried not to lose his grip. Carey eventually was able to slide his gun into his waistband while

he continued to fight off the gang with his other hand. While the men continued to hit Carey in the head, ribs and back, the detective yelled at DeWitt to call for help. Carey finally broke away and ran toward DeWitt; appellant then approached him and said, "Who are you? You want to be a hero?" Appellant punched Carey "square in the face," which sent the detective reeling back into the group of men, who continued to punch him in the back and side. At that point, Carey gave up fighting back and simply tried to protect himself and his gun by curling up against the side of a car. Carey further testified that the fight ended when appellant and his companions got in their van and drove away. The detectives got in their car and radioed a description of the van as they followed the suspects.

{¶ 12} Appellant testified that as he and his companions left Scarlett's and walked through the parking lot, he saw DeWitt and Carey leaving as well. He testified that he heard the term "spic" used by one of the detectives and believed it was directed toward him. Appellant responded by yelling, "Hippie mother fucker" and the two men began shouting back and forth. Appellant admitted that the surveillance video shows him walking toward the detectives as the argument began. Appellant continued to argue as his brother stood between the two men and tried to defuse the situation. Appellant testified that as the two men argued, he saw Detective Carey walk up and "put a gun directly in my brother's face." Appellant stated that he immediately punched Carey in the face because he thought the detective was going to hurt his brother. After that, appellant and Carey began to struggle. Appellant testified that he did not attempt to take the gun

away from Carey because he lost sight of it. While he was struggling with Carey, appellant saw Detective DeWitt reach into his coat pocket. Believing DeWitt might have been reaching for a gun, appellant ran over to DeWitt and attempted to punch him. DeWitt moved away and appellant started after him but turned back when he saw that DeWitt had taken a cell phone, not a gun, from his pocket. Appellant stated that since DeWitt had only a cell phone, there was no reason to engage with him. Appellant testified that he never saw either of the detectives display their badge and did not hear them announce themselves as police officers prior to or during the fight. According to appellant, the fight ended when he realized that Carey had a weapon and that they "needed to get out of there." Appellant yelled to his companions to leave and they all got in the van.

{¶ 13} Generally, requested jury instructions should be given if they are a correct statement of law as applied to the facts of the case. *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585. "\* \* \* [A] court's instructions to the jury should be addressed to the actual issues in the case as posited by the evidence and the pleadings." *State v. Guster* (1981), 66 Ohio St.2d 266, 271. Further, a determination as to jury instructions is a matter left to the sound discretion of the trial court. *Id.* "In reviewing a record to ascertain the presence of sufficient evidence to support the giving of an \* \* \* instruction, an appellate court should determine whether the record contains evidence from which reasonable minds might reach the conclusion sought by the instruction." *Feterle v. Huettnner* (1971), 28 Ohio St.2d 54, syllabus.

{¶ 14} A person who uses force in defense of others "stands in the shoes" of the person he or she is defending. *State v. Wenger* (1979), 58 Ohio St.2d 336, 340. This rule means that the intervenor "acts at his own peril if the person assisted was in the wrong." *Id.* at 339. If the person being defended had no right to self-defense, the intervenor is not entitled to use force to defend that person, and cannot prevail on a "defense of others" defense. The intervenor asserting such a defense has the burden of proving the affirmative defense of self-defense. R.C. 2901.05; *State v. Seliskar* (1973), 35 Ohio St.2d 95, 96. The intervenor must prove that the person being defended was not at fault in creating the situation. See *State v. Robbins* (1979), 58 Ohio St.2d 74, 80. Even if the intervenor stands in the shoes of a person with a right to self-defense, *the intervenor must have a reasonable, good faith belief that the person being aided was in imminent danger of death or bodily harm.* *State v. Williford* (1990), 49 Ohio St.3d 247; *State v. Harris* (1998), 129 Ohio App.3d 527.

{¶ 15} In this case, the evidence in support of appellant's claim that he believed his brother was in imminent danger of death or bodily harm was insufficient to justify a jury instruction on defense of others. The evidence indicates that when the altercation began between appellant and Detective DeWitt, appellant's brother Nicholas stepped between the two men. Appellant claims that Detective Carey then stepped up and put a gun to his brother's head. Testimony from the detectives does not support that claim. Rather, the testimony indicates that as the situation deteriorated, appellant was not acting in defense of his brother but was committing an assault upon the detectives. The evidence indicates

that appellant was, in fact, the aggressor. In addition, both detectives testified that they identified themselves as police officers and displayed their badges early on in the scuffle, before Carey brought out his weapon. The evidence at trial demonstrates that appellant's claim that he did not hear the detectives announce themselves as police officers and did not see their badges being held up is unreasonable. The testimony simply does not support an argument that appellant had a "reasonable, good faith belief that the person being aided was in imminent danger of death or bodily harm." See *Williford*, supra. Accordingly, appellant's claim that his brother was in need of defending is not supported by the record. We therefore find that the trial court did not abuse its discretion by denying appellant's request for a jury instruction on the defense of others. Appellant's sole assignment of error is not well-taken.

{¶ 16} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Thomas J. Osowik, P.J.

JUDGE

Stephen A. Yarbrough, J.  
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.