[Cite as *In re Z.G.*, 2013-Ohio-2482.]

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

In re Z.G.

Court of Appeals No. E-12-063

Trial Court No. 2012 JF 004

DECISION AND JUDGMENT

Decided: June 14, 2013

* * * * *

Mary M. James, Erie County Public Defender, for appellant.

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Ashley L. Thomas, Assistant Prosecuting Attorney, for appellee.

* * * * *

OSOWIK, J.

{¶1} This is an appeal from a judgment of the Erie County Court of Common Pleas, Juvenile Division, following a bench trial, in which the trial court found appellant, Z.G., to be a delinquent child for having committed felonious assault in violation of R.C.

2903.11(A)(1), a second degree felony if committed by an adult. On appeal, appellant sets forth the following three assignments of error:

I. The trial court erred by finding appellant at fault for creating the situation that led to [the] alleged victim's harm.

II. The trial court erred by finding that appellant had a duty to retreat.

III. The Trial court erred by not granting self defense as an affirmative defense.

{¶2} On January 8, 2012, an altercation took place between appellant and M.M., the father of B., appellant's ex-girlfriend. The dispute began when appellant asked B.'s next door neighbor, J., a twelve-year-old girl, to find out if B. was currently having sex with anyone. B., who reportedly was pregnant with appellant's child, told J. that she was having sex with a male named "Spencer." Appellant, who overheard the conversation, approached B., called her a "bitch," "ho," and a "slut," and expressed a desire to hit her. B. then went back into her house.

{¶3} Several minutes after the argument between appellant and B. took place, M. and his girlfriend came home from visiting a local bar. When B. told him about the argument, M. came out of his house, went next door to where appellant was standing in the yard, and confronted appellant. A physical altercation between appellant and M. ensued, during which appellant swung a two-by-four at M., hitting him in the ribs, and M. punched appellant in the face. Later, M. chased appellant down the street, and appellant

threw two pieces of paving brick at M. One of the bricks hit M. in the face, requiring 24 stitches. The police were called to the scene, after which appellant was arrested and charged with felonious assault.

{¶4} A bench trial was held in the Erie County Court of Common Pleas, Juvenile Division, before a court-appointed magistrate, on March 15, 2012. Testimony at trial was as follows.

{¶5} Eric Costante, an officer with the Sandusky Police Department, testified that he was called to M.'s home, on Campbell Street in the city of Sandusky, on January 8, 2012, in response to a report of fighting. When Costante arrived at the scene he observed M. bleeding heavily from wounds on his face and forehead. Constante testified that M. said he was assaulted by appellant. He further testified that B. and J. were there, along with T.G., M.'s girlfriend, and another individual.

{¶6} Costante stated that M. told him B. and appellant argued, after which M. went to talk to appellant and confront him. The two began to argue, and appellant picked up a two-by-four and hit M. with it. M. then took the two-by-four away from appellant, after which appellant threw bricks at him. Constante stated that, as a result of his investigation, felony assault charges were filed against appellant.

{¶7} Constante further testified that he did not speak to appellant; however, he saw "landscaping stones" in J.'s backyard. Constante stated that a picture of M.'s injuries was taken by another officer at his request, and that it accurately portrayed M.'s

injuries. Constante stated that he did not see any blood on any of the bricks, which were about four inches thick and 12 inches long.

{¶8} B. testified at trial that she is M.'s 15-year-old daughter, and that she lives at 1440 Campbell St., with her father, mom and stepmom, brother and sister. She stated that T.G. is her "stepmom." B. further testified that she used to date appellant and that, on January 8, 2012, appellant was visiting her cousin, J., who lives next door. B. said that J. came over and said that appellant wanted to talk to her. She then went outside to speak to appellant, who got mad and began arguing and accusing her of having sex with another male.

{¶9} B. stated that M. came home shortly after she went back into her house and she told him about the argument, which caused him to "started trippin" because he was drunk. She further stated that M. went out to confront appellant while B. and T. stayed inside. They then heard a scream, came out, and saw blood dripping down M.'s face.

{¶10} B. testified that she told M. that appellant threatened her "but I said it wasn't a big deal because I knew [appellant] wouldn't do nothing to me." However, B. also testified that appellant said "he was going to choke me and throw me down on the ground." B. said that appellant never made that kind of threat before, and he was still yelling at her after she went into the house. When M. asked her why appellant was yelling and calling her a "B," she told him that J. made a comment that started an argument. B. further stated that M. went outside and called appellant a "name," which

made appellant mad, and that when M. "came at him," appellant picked up the two-by-four and hit M. B. testified that M. picked up the board and threw it away, then grabbed appellant's head and "busted it." Appellant then picked up "lawn bricks," broke them in pieces, and started throwing them at M. B. drew a picture demonstrating that the bricks were approximately eight inches long before appellant broke them. She stated that the two-by-four was longer than M. was tall, and that appellant hit M. on his side, in the hip area. B. testified that M. walked back to his house after being hit with the brick, and that appellant walked back toward J.'s house, got on his bike, and rode away.

{¶11} On cross-examination, B. testified that M. grabbed appellant's head and "busted his head on his knee or something like that." She said that appellant hit M. with the brick despite the fact that appellant was running away at the time. On redirect, B. testified that M. did not use a weapon, and did not hit appellant with anything other than his knee and his hand.

{¶12} M. testified at trial that he came home from the Waterfront Café at approximately 10 p.m., went into his house, and talked to B., who said "that [appellant] had threatened to choke and hurt her and he was outside still and I went outside to see, you know, why he wasn't leaving after doing this." M. stated that appellant was standing in the grass "median" between the two houses, talking to J., and that B. was in her bedroom, crying. M. stated that he asked appellant "what is your deal here threatening my daughter," and that appellant responded by asking if M. "wanted a piece of him"

before stepping back, grabbing a two-by-four and hitting M. on his side. M. stated that, after appellant hit him, he took the two-by-four away. Then appellant punched M. in eye, and M. "clipped him" with his fist. Thereafter, M. took hold of appellant, and B. came out of the house crying and told him to let appellant go. M. stated that appellant broke free of his hold, ran away, and started throwing bricks at M. and hitting him on the forehead.

{¶13} M. stated that bricks were taken from property a few doors down from his house. He denied hitting appellant with the two-by-four. M. said the incident occurred at 9 or 10 p.m., and that he received 24 stitches at the hospital, along with treatment for a bruised side and a concussion. On cross-examination, M. testified that he had been drinking alcohol at the Waterfront Café. M. further testified on cross-examination that appellant threw the bricks at him from a distance of approximately 10 feet, and that it was about 20 to 25 feet from his house to where the bricks were thrown. He denied chasing and yelling at appellant.

{¶14} T. G. testified at trial that she lives with M., B., two other children, and J. G., M.'s ex-wife. T. stated that she was with M. at the Waterfront Café, and that it was still light outside when they came home on January 8, 2012. T. stated that B. told M. appellant had threatened her, after which M. and appellant "had words" and appellant picked up the two-by-four and swung it at M. T. further stated that M. wanted appellant

to leave his daughter alone. She stated that appellant was the first one to pick up the two-by-four.

{¶15} T. testified that she called police when she saw appellant throw bricks at M. from a yard across the street. She stated that the fight "started on the sidewalk and it ended up in the middle of the street," and that M. was bleeding so hard he could not see. She further stated that she saw appellant get on a bike and "take off" after he hit M. with the brick.

{¶16} On cross-examination, T. testified that M. did not yell at appellant, and she did not know what caused the fight. She stated that M. "clipped" appellant with the two-by-four when he took it away, and that he acted "in defense kind of because they were in the middle of the street." T. stated that she was new to the neighborhood, and she did not know appellant before that night. On redirect, T. testified that M. did not swing the two-by-four, or any other object, at appellant. At the close of T.'s testimony, the state rested. Testimony was then presented by the defense.

{¶17} J. testified at trial that she knows B. and is also a friend of appellant. J. stated that, on January 8, 2012, B. said something to her that caused appellant to get angry and argue with B. When M. heard about the argument, he came out of his house, looking "really mad" and called appellant "a whole bunch of names." J. testified that it was M. who had the two-by-four in his hand, and that M. swung the board at appellant, and then hit appellant with his hands. J. further testified that, after M. dropped the two-

by-four, appellant picked up a broken brick and threw it at M. J. stated that she saw M. hit appellant with his fist, and she described the pieces of brick as "small."

{¶18} On cross-examination, J. testified that she and appellant grew up together and are close friends. J. stated that she told police about the two-by-four that night. Thereafter, she was asked to read a portion of her statement to police, which read:

> [Appellant] and my friend were fighting, B. told her dad, Matt came outside and started screaming and yelling at them * * * [Appellant] picked up the wood that was in the yard and then went into the street, Matt took the brick out of [Appellant's] hand and then threw it down. [Appellant] picked up a brick and threw it at Matt's head and Matt left and then [Appellant] ran in the house and ran out the back door.

{¶19} J. testified that she did not sign her statement but her grandmother, who was present when the statement was made, signed on her behalf. On redirect, after being advised of her Fifth Amendment rights, J. testified to a different version of events than the one in her statement as follows:

> [Appellant] backed up, Matt picked up a two-by-four and started swinging it at [appellant] but he missed. Then they took it into the street and then Matt grabbed another one and hit [appellant] with it, and then he started swinging at [appellant] and then [appellant] picked up the brick and hit him with it.

{¶20} On recross, J. testified that she did not remember telling police that appellant picked up the two-by-four, or that appellant picked up two bricks. However, she did remember saying that one brick hit M. in the head and that appellant fled on a bicycle. She stated that appellant "might have called [M.] a name" but she was not sure because she was two feet closer to M. than she was to appellant. On further redirect, J. stated that she told her revised story to a second police officer, but it was not reduced to a writing. J. stated that she was nervous when talking to police.

{¶21} Appellant testified at trial, after being advised of his Fifth Amendment rights, that he was attending a "shoplifting" class on January 8, 2012, when a friend told him B. was pregnant and "having sex with two or three other guys." He then got angry and went to J.'s house, where he heard B. admit to having sex with someone named "Spencer." Appellant stated that he called B. foul names like "B" and "Ho," but he did not threaten her. However, he admitted to saying that he "wanted to hit her."

{¶22} Appellant stated that he was in the grass next to J.'s house when M. came home, and that he called a friend for a ride because he "knew something was going to happen because I know how B.'s dad is." Appellant stated that, after talking to B., M. came out of house, walked into J.'s driveway and said "What the 'F' did you say to my daughter?" Appellant testified that he responded by saying "Awe, man, dude," after which M. tried to push him out of the yard. When appellant tried to push back, M. said "Come on" and called him the "N word." Appellant further testified that he pushed M.,

who stumbled backwards before picking up the two-by-four and swinging it at appellant as he walked away. Appellant stated that M. hit him with the board, after which he got up and ran away. While running, he picked up a paving brick, broke it in pieces, and began throwing the pieces at M. after warning him not to come any closer. One piece missed, but the second one hit M. in the head. At that point, B. tried to grab appellant's wrist and stop the fight, but appellant told her to "let the 'F' go of me", and pushed her away. Appellant said that M. stated he was "out for blood" and that he threw the bricks because "I felt like I could have turned around and ran, but I felt like he was like, I wouldn't have been fast enough and he would have hit me."

{¶23} On cross-examination, appellant testified that he was in shoplifting class because he stole an energy drink from a local Kroger's store. He further testified that he and B. broke up in December 2011, but he believed that B. was pregnant with his child and thought it was "disrespectful" for her to have sex with other guys while she was pregnant. Appellant stated that he was "highly upset" and yelling at her, and that he was angry enough to hit her if she had been a guy. Appellant further stated that he overheard J. ask B. if she was having sex with anyone, and he heard B., who did not know that appellant was there, say "yes." He then "got mad" and went outside, called B. names, and said "I really want to hit you, but I won't because you're a girl."

{¶24} Appellant stated that he was smoking a "Black and Mild" on J.'s porch when M. drove up. He stated that he did not go inside because he was smoking, and

because he thought M. would just yell at him. Appellant said he ran "three or four houses down" before picking up the brick and breaking it so he would have something to defend himself with in case M. "kept coming" at him. Appellant said he did not just run away because M. was "right behind me." When asked again why he did keep on running, appellant said:

> Like I told you, I just got done smoking the Mild, like when I threw it, I need time. Like me, personally I need time like after I smoke a Mild. I need like a few minutes to like not do anything sport-like like running, anything, I don't do anything like that.

{¶25} On redirect, appellant testified that he believed M. could have caught him and he did not feel safe enough to continue to run. Nevertheless, even though M. was close enough to tackle him, he stopped long enough to pick up the brick, break it, and throw the pieces at M. Appellant stated that he did not ride away on his bike at first because he was afraid of violating the city curfew.

{¶26} In rebuttal, Officer Constante testified that J. told him M. shoved appellant, after which appellant hit M. with the two-by-four. Constante testified that J. did not say that M. hit appellant with a board, but she did say that appellant threw bricks at M. and then fled on a bike. On cross-examination, Constante testified that J. did not tell him how appellant's face was injured. She did, however, state that appellant told M. to "get off of me." Constante said that J. was not directed to give further statements to another officer.

{¶27} On March 30, 2012, the magistrate issued a proposed decision. After reciting the facts of the case, the magistrate amended the complaint from a charge of felonious assault in violation of R.C. 2903.11(A)(2), to R.C. 2903.11(A)(1), to more accurately reflect the crime charged. The magistrate also found that the testimony presented by appellant and J. was not credible, and appellant's testimony contained many statements that could not be supported by the evidence. Thereafter, the magistrate found that appellant had not adequately set forth a claim of self-defense pursuant to R.C. 2901.05(A), and found him guilty of felonious assault, a second degree felony if committed by an adult. Specifically, the magistrate found that: (1) appellant did not prove any of the elements of self-defense, in that he was at fault in creating the situation by threatening B. and waiting for M. to come home, (2) appellant did not demonstrate a reasonable belief that he was in imminent danger of death or great bodily harm, and (3) he did not retreat from the confrontation in spite of having a duty to do so. On May 10, 2012, appellant filed objections to the magistrate's decision.

{¶28} On August 23, 2012, the trial court journalized a judgment entry in which it upheld the magistrate's decision, after finding that: (1) the complaint was properly amended to reflect a charge pursuant to R.C. 2903.11(A)(1), (2) the evidence presented at trial demonstrated that appellant was at fault in creating the violent situation that led to M.'s injuries, and (3) although the evidence "marginally" demonstrated that appellant reasonably believed he was in imminent danger of serious bodily harm, appellant did not

retreat from the violent confrontation when he had a chance.[1] The trial court specifically found that the evidence shows appellant "clearly had several chances to avoid the confrontation, not only before it started but also during the sequence of events. He didn't retreat until he incapacitated the victim." Accordingly, the trial court denied appellant's objections and approved and adopted the magistrate's decision. A timely notice of appeal was filed in this court on October 4, 2012.

{¶29} On appeal, appellant asserts that the trial court erred by finding that: (1) appellant was at fault for creating the situation that lead to the confrontation with M., (2) appellant had a duty to retreat, and (3) appellant had not established the elements of self-defense. Because all three of appellant's assignments of error are related, we will consider them together.

{¶30} As set forth above, the trial court found appellant guilty of felonious assault in violation of R.C. 2903.11(A)(1), which states that "No person shall knowingly * * * [c]ause serious physical harm to another or to another's unborn * * *." It is undisputed that appellant and M. engaged in a confrontation, in which M. was seriously injured. However, appellant asserted in the trial court and on appeal that he acted in self-defense.

{¶31} Self-defense is an affirmative defense which may be asserted as "justification for admitted conduct." *State v. Martin*, 21 Ohio St.3d 91, 94, 488 N.E.2d

[1] The trial court stated that the magistrate "applied the wrong elements to the issue of self-defense" by analyzing appellant's duty to retreat in the context of a situation involving deadly force. However, the trial court found that the magistrate reached the correct legal conclusion in this case, despite its faulty analysis on that point.

166 (1986). As such, a claim of self-defense "seeks to relieve the defendant from culpability rather than to negate an element of the offense charged." *Id.* The Ohio Supreme Court has held that the affirmative claim of self-defense must be established by a preponderance of the evidence. *State v. Johnson*, 6th Dist. No. L-08-1325, 2009-Ohio-3500, ¶ 11, citing *State v. Jackson*, 22 Ohio St.3d 281, 283, 490 N.E.2d 893 (1986). Preponderance of the evidence is defined as "that measure of proof that convinces the judge or jury that the existence of the fact sought to be proved is more likely than its nonexistence." *State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 958 N.E.2d 1235 (2011), ¶ 54.

{¶32} In order to establish a claim of self-defense, the following elements must be shown:

> (1) the [accused] was not at fault in creating the situation giving rise to the affray * * *; (2) the [accused] has 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) the [accused] must not have violated any duty to retreat or avoid the danger * * *. (Citations omitted.) *State v. Jackson*, 22 Ohio St.3d 281, 283, 490 N.E.2d 893 (1986).

{¶33} The Ohio Supreme Court has held that "the elements of self-defense are cumulative. * * * If the defendant fails to prove *any one* of these elements by a

preponderance of the evidence he has failed to demonstrate that he acted in self-defense." (Emphasis sic.) *Id.* at 284, citing *State v. Robbins*, 58 Ohio St.2d 74, 388 N.E.2d 755 (1979).

{¶34} On appeal, we are required to keep in mind that "[t]he weight to be given evidence and the credibility of the witnesses are primarily decision for the [trier of fact.]" *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. Accordingly, after reviewing the entire record that was before the trial court, which included testimony presented by the victim, his daughter, appellant, and several eyewitnesses, we agree with the trial court's conclusion that appellant has not established the first element necessary for the affirmative defense of self-defense, i.e., that he was not at fault in causing the situation that gave rise to a physical altercation between appellant and M.

{¶35} In addition, although the trial court found that appellant "marginally" established a reasonable belief that he was in danger of bodily harm, the record clearly shows that appellant caused serious bodily harm to M. Finally, nowhere in the record is there evidence that appellant attempted to withdraw from the conflict with M. To the contrary, appellant stood his ground and threw pieces of bricks at M. when he had the chance to run away. *See State v. Robbins*, 58 Ohio St.2d 74, 388 N.E.2d 755 (1979).

{¶36} On consideration of the foregoing, we find that the trial court did not err when it rejected appellant's claim of self-defense. Appellant's three assignments of error are, therefore, not well-taken.

{¶37} The judgment of the Erie County Court of Common Pleas, Juvenile Division, 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.

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE