[Cite as *State v. Roundtree*, 2015-Ohio-2230.]

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

State of Ohio	Court of Appeals No. L-14-1052
Appellee	Trial Court No. CR0201301654
v.	
Antonio Nikki Roundtree	**DECISION AND JUDGMENT**
Appellant	Decided: June 5, 2015

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

James J. Popil, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas that found appellant Antonio Roundtree guilty of one count of felonious assault and imposed an eight-year prison sentence. For the following reasons, the judgment of the trial court is affirmed.

{¶ 2} The undisputed facts relevant to the issues raised on appeal are as follows. On the night of December 15, 2012, Ruben Rodriguez and his girlfriend went to the Pour House, a bar on Bennett St. in Toledo, Ohio. Once there, Rodriguez saw appellant, whom he had known for several years, enter with a friend. Shortly thereafter, the two men left the bar and reportedly went outside to fight. As a result, Rodriguez was stabbed in the neck and back. Before being taken to the hospital, Rodriguez told the responding officer that appellant had stabbed him with a knife. There were no witnesses to the fight and no weapon was found at the scene. Appellant left the bar before police arrived. Rodriguez's girlfriend, Amanda Salazar, gave police appellant's name and a description of his car.

{¶ 3} Appellant testified at trial that he called a federal agent and turned himself in. On April 26, 2013, appellant was indicted on one count of felonious assault in violation of R.C. 2903.11(A)(2). On February 4, 2014, a jury found appellant guilty of the charge and he subsequently was sentenced to eight years in prison. This timely appeal followed.

{¶ 4} Appellant sets forth the following assignments of error:

I. The appellant was denied a fair trial as the trial court erred in ruling that statements supporting appellant Roundtree's self-defense affirmative defense were excluded as inadmissible hearsay.

II. The conviction against appellant Roundtree was against the manifest weight of the evidence.

III. The conviction against appellant Roundtree was not supported by the sufficiency of the evidence.

IV. Prosecutorial misconduct during the trial deprived appellant of a fair trial in violation of his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Ohio Constitution.

V. The trial court abused its discretion in sentencing appellant to a maximum term.

VI. The cumulative errors deprived appellant of a fair trial in violation of his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Ohio Constitution.

{¶ 5} In support of his first assignment of error, appellant asserts that the trial court erred by sustaining the state's objections to several statements made by defense witnesses.

{¶ 6} We note that evidentiary determinations are within the broad discretion of the trial court and are subject to review for an abuse of that discretion. *State v. Maurer*, 15 Ohio St.3d 239, 473 N.E.2d 768 (1984).

{¶ 7} Appellant first argues that the trial court erred by striking defense witness Andrea Curry's statement that, before the fight, she heard Rodriguez say to appellant, "Nigga, is you ready to die?" The prosecutor objected to the statement and the court had it stricken from the record as hearsay. Appellant argues that the statement was either an

excited utterance or permissible under Evid.R. 801(D)(1) as it was inconsistent with Rodriguez's earlier testimony that he and appellant had exchanged words. First, we find no support for the claim that the statement in question was an excited utterance. Additionally, the fact that Rodriguez had already testified that he and appellant had exchanged words about fighting does not allow Curry's testimony as an exception to hearsay.

{¶ 8} Appellant also argues that the same error occurred two more times during trial: once when witness Nicholas Willis testified that he heard Rodriguez ask appellant, "Are you ready?" before the fight and again when appellant testified that before the fight Rodriguez said, "I'm going to kill you." Appellant simply states that the same rationale as set forth in support of Curry's statement also supports Willis' testimony. As to Willis, appellant argues that the statement was not hearsay because Rodriguez had testified earlier to having said the same thing. As to appellant stating that Rodriguez said he was going to kill him, appellant asserts the statement should have been allowed under the excited utterance exception set forth in Evid.R. 803(2). Upon consideration, we find that Willis' statement constituted hearsay even though Rodriguez had earlier testified to having made the statement. As to appellant's testimony that Rodriguez said he was going to kill him, appellant provides no argument in support of the claim that the statement was an excited utterance as defined in Evid.R. 803(2) and we find it to be without merit.

{¶ 9} Appellant also asserts that Toledo Police Officer Donald O'Brien should not have been permitted to testify on cross-examination that witnesses had told him appellant

walked into the bar and confronted Rodriguez. The record reflects that defense counsel objected when, *in response to his own question*, the officer stated that Amanda and several other people commented that appellant entered the bar and confronted Rodriguez. After a lengthy discussion at the bench, the trial court overruled counsel's objection to the officer's response. When cross-examination resumed, counsel asked the officer the same question. Appellant has not provided any authority to support his claims that the disputed testimony was non-hearsay and therefore admissible.

{¶ 10} Based on the foregoing, appellant's first assignment of error is not well-taken.

{¶ 11} In his second assignment of error, appellant asserts that his conviction was against the manifest weight of the evidence based on incorrect evidentiary rulings regarding his self-defense claim and prosecutorial misconduct. Essentially, appellant claims he was not permitted to fully assert his affirmative defense of self-defense.

{¶ 12} An affirmative defense may be considered in evaluating a claim that a verdict was against the manifest weight of the evidence. *See, e.g., State v. Taylor*, 6th Dist. Lucas L-08-1157, 2009-Ohio-2937, ¶ 11. "In order to prevail on the issue of self-defense, the accused must show that he was not at fault in starting the affray, and that he had a bona fide belief that he faced imminent danger of death or great bodily harm and that his only means of escape was the use of such force, and that he violated no duty to retreat or avoid the danger. 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." *State v. Jackson*, 22 Ohio St.3d 281, 284, 490 N.E.2d 893 (1986).

{¶ 13} "A manifest weight challenge questions whether the state has met its burden of persuasion." *State v. Davis*, 6th Dist. Wood No. WD-10-077, 2012-Ohio-1394, ¶ 17, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). In making this determination, the court of appeals sits as a "thirteenth juror" and, after "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, 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." *Id.* at 386.

{¶ 14} As set forth in *Jackson, supra*, the elements of self-defense are cumulative. If the defendant fails to prove any one of the elements by a preponderance of the evidence, he has failed to demonstrate that he acted in self-defense.

{¶ 15} Here, the jury found appellant guilty of felonious assault. Appellant concedes that the elements of the affirmative defense of self-defense were explained in the instructions to the jury. It is apparent from the verdict that first, the jury believed the testimony of the state's witnesses that appellant committed the offense of felonious assault and second, that the jury was not convinced by appellant's testimony that Rodriguez was the aggressor, threatening him and brandishing a knife, thus causing him to fear death or great bodily harm.

{¶ 16} Officer O'Brien, first to respond to the call, testified that the victim's girlfriend stated appellant entered the bar and confronted Rodriguez.

{¶ 17} Rodriguez testified that on the night of the assault appellant walked into the bar and stared at him. The two men had known each other for several years but were no longer friends. At that time, Rodriguez expected that they would either fight or talk. Rodriguez said, "What's up? You know what time it is." He did not see a knife because appellant's hands remained in his pockets. They stepped outside and appellant's knife came out "right away." Rodriguez testified that he did not have a weapon of any sort and had expected a fistfight. He attempted to take the knife from appellant but was unsuccessful and was stabbed in the back and neck. When Rodriguez saw that he was losing blood, he took his shirt off and tied it around the wound on his neck. He returned inside and waited for an ambulance to arrive. When Officer O'Brien arrived, Rodriguez gave him appellant's name. Rodriguez further testified that appellant drove away before the police responded.

{¶ 18} Amanda Salazar, Rodriguez's girlfriend, testified that the two men began to bicker after appellant arrived and a few minutes after that went outside. Salazar followed them out the door and saw them "going in circles." She then saw appellant with a knife and heard someone scream that Rodriguez had been stabbed. She further testified that Rodriguez does not carry a knife and that she did not see him with one that night.

{¶ 19} Andrea Curry, the bartender on the night of December 15, 2012, testified for the defense. She stated that she saw Rodriguez approach appellant and talk to him.

Curry had the impression that Rodriguez wanted to harm appellant. Appellant turned from the bar and walked outside, followed by Rodriguez. Curry did not see anything that happened outside the bar.

{¶ 20} Appellant's friend Nicholas Willis testified that he went to the bar with appellant on the night of December 15. Rodriguez and his girlfriend were already there. After he and appellant entered, Willis heard Rodriguez and appellant yelling back and forth. Willis believed Rodriguez was the aggressor. Willis followed the two men out of the bar and when they got outside saw both Rodriguez and appellant with knives. Willis saw the two men take swings at each other and then saw Rodriguez with blood running down his neck. Rodriguez took his shirt off and held it on his wound before running back into the bar. At that point, Willis and appellant left.

{¶ 21} Appellant testified that after he walked into the bar Rodriguez turned around and the two men made eye contact. They exchanged words and appellant believed Rodriguez was going to fight him or "do some harm to me." Appellant testified that he told Rodriguez he was not trying to fight. The bartender told them they could not fight inside so appellant and his friend Willis walked out the door. After he stepped outside he heard Willis say that Rodriguez had a knife. Appellant testified that he turned around and saw Rodriguez with a knife in his hand. Appellant took his knife out and told Rodriguez to "back up off me" as Rodriguez started to close in on him. Rodriguez swung at him with a knife and appellant immediately swung at Rodriguez with his own knife. After the men exchanged blows, appellant heard his friend tell Rodriguez he was

bleeding and stopped. Appellant testified that when he saw Rodriguez holding his hand over his neck he felt as if he was in shock. He turned around, got in his car and drove away. Appellant further testified that he felt threatened by Rodriguez and thought he might be hurt or possibly killed because Rodriguez was holding a knife and "hollering out threats." Appellant did not offer any evidence of injury. He testified that he swung at Rodriguez three times and hit Rodriguez each time.

{¶ 22} After a review of the entire record, we find that competent credible evidence supports the jury's verdict. We find no evidence that the fact finder lost its way or created a manifest miscarriage of justice in this case. It is evident that in this case the jury heard the witnesses, weighed the evidence and rejected appellant's claim that he acted in self-defense when he admittedly stabbed the victim three times. Accordingly, appellant's second assignment of error is not well-taken.

{¶ 23} In support of his third assignment of error, appellant asserts that his conviction was not supported by the sufficiency of the evidence and that the trial court erred when it denied his Crim.R. 29 motion for acquittal at the close of state's evidence and at the close of his case.

{¶ 24} We review a ruling on a Crim.R. 29(A) motion under the same standard used to determine whether the evidence was sufficient to sustain a conviction. *See State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, 824 N.E.2d 959, ¶ 39-40; *State v. Herculson*, 6th Dist. Wood No. WD-11-080, 2013-Ohio-1838. "In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a

question of law." *Thompkins, supra*,78 Ohio St.3d 386, 678 N.E.2d 541. "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶ 25} Appellant asserted an affirmative defense of self-defense. Under Ohio law, affirmative defense may not be considered in connection with sufficiency of the evidence arguments. "The elements of the crime and the existence of self-defense are separate issues. Self-defense seeks to relieve the defendant from culpability rather than to negate an element of the offense charged." *State v. Martin*, 21 Ohio St.3d 91, 94, 488 N.E.2d 166 (1986). Further, an affirmative defense must be proven by the defendant, and "does not negate an element of the offense, rather, it acts a as defense for committing the elements of the offense." *See State v. Levonyak*, 7th Dist. Mahoning No. 05 MA 227, 2007-Ohio-5044, ¶ 38. Thus, arguing that a defendant proved self-defense "is not an argument that should be made in reference to a sufficiency argument." *Id*.

{¶ 26} R.C. 2903.11(A)(2) provides, "No person shall knowingly * * * cause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance."

{¶ 27} Here, the jury found the state proved the elements of felonious assault beyond a reasonable doubt. Further, appellant admitted he intended to stab Rodriguez with a knife. Accordingly, appellant's third assignment of error is not well-taken.

{¶ 28} In support of his fourth assignment of error, appellant claims prosecutorial misconduct. Appellant first argues that the prosecutor improperly questioned him about his failure to speak to local police after the assault. This line of questioning occurred after appellant testified on direct that he had turned himself in to a federal agent he named only as "Kyle" on the day of the stabbing but did not call local law enforcement. Appellant's testimony on direct was vague as to any details of when or where he turned himself in and which federal agency he contacted. Accordingly, the prosecution inquired as to why the state had no information from any federal law enforcement agency regarding appellant's having turned himself in after the stabbing. When the prosecutor asked appellant if he ever made an effort to speak with the Toledo Police, appellant said that he made arrangements with "Kyle" to turn himself in. When asked again if he ever talked to the Toledo Police, appellant responded, "After I turned myself in to my attorney. * * * I mean, to Kyle." Defense counsel objected to the line of questioning and was overruled.

{¶ 29} Generally, "prosecutorial misconduct occurs when the prosecutor makes a statement that is improper and the improper statement causes prejudice to appellant." *State v. Stowers*, 6th Dist. Erie No. E-12-055, 2014-Ohio-147, ¶ 39, citing *State v. Smith*, 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984). Prosecutors are generally entitled to considerable latitude in opening and closing arguments. *State v. Ballew*, 76 Ohio St.3d 244, 667 N.E.2d 369 (1996).

{¶ 30} Upon review of the trial transcript, we find that appellant's testimony on direct opened the door to the prosecution's line of inquiry and that the trial court did not abuse its discretion by allowing it. Defense counsel initially raised the issue of appellant's claimed contact with the federal agent and whether appellant turned himself in to Toledo Police during direct testimony. The state was therefore permitted to challenge appellant's credibility regarding that testimony. The prosecutor was asking appellant questions based on appellant's own direct testimony and the cross-examination did not constitute prosecutorial misconduct.

{¶ 31} Appellant also claims that prosecutorial misconduct occurred during closing argument when the prosecutor stated that defense counsel did not ask appellant about his felony history because counsel did not want the jury to know about it. Appellant claims the prosecutor improperly stated, "Mr. Wingate did not, remember this, ask his client about his felony history, did he? Because he doesn't want you to know that."

{¶ 32} Additionally, appellant claims the prosecutor incorrectly stated that the jury must consider the self-defense instruction in light of the victim's and appellant's actions once they were outside when he stated, "Self-defense talks about who the aggressor is. Was [Rodriguez] aggressive inside the bar? Of course he was. But once they got outside that's truly when you must consider the self-defense instruction and you must consider whether or not [Rodriguez] even had a knife."

{¶ 33} During closing arguments, the prosecution is free to comment upon that which the evidence has shown and any reasonable inferences that can be drawn therefrom. *State v. Lott*, 51 Ohio St.3d 160, 555 N.E.2d 293 (1990). Most significantly, any purported misconduct of counsel during closing arguments must be considered in the context of the entire case to determine if it resulted in actual prejudice to the defendant. *State v. Lorraine*, 66 Ohio St.3d 414, 613 N.E.2d 212 (1993).

{¶ 34} Appellant provides no explanation as to how he may have been prejudiced by the foregoing statements and simply states they constituted misconduct. Considering appellant's argument in the context of the entire case, this court finds that appellant has demonstrated no instances of prosecutorial misconduct during closing argument or otherwise, and has not shown that he was prejudiced therefrom. Accordingly, appellant's fourth assignment of error is not well-taken.

{¶ 35} In support of his fifth assignment of error, appellant asserts that the trial court abused its discretion in sentencing him to a maximum prison term of eight years without applying factors set forth in R.C. 2929.11 and 2929.12. Appellant argues that a less-than-maximum sentence would not demean the seriousness of appellant's conduct and would adequately protect the public from future criminal conduct on his part.

{¶ 36} First, we note that an appellate court's standard of review is not whether the sentencing court abused its discretion. R.C. 2953.08(G)(2), effective March 22, 2013, establishes that an appellate court may increase, reduce, modify, or vacate and remand a disputed sentence if it clearly and convincingly finds either of the following: (a) that the

record does not support the sentencing court's findings under R.C. 2929.13(B) or (D), 2929.14(B)(2)(e) or (C)(4), or 2929.20(I), whichever, if any is relevant; or (b) that the sentence is otherwise contrary to law.

{¶ 37} Our review of the record and the statute indicates that none of the factors listed under R.C. 2953.08(G)(2) are applicable herein. Therefore, the sentence may be reversed or modified only if it is "otherwise contrary to law." In this case, the sentencing range was two, three, four, five, six, seven or eight years. R.C. 2929.14(A)(2). Appellant's sentence of eight years was within that range. When it imposed appellant's sentence, the trial court indicated it had considered the principles and purposes of sentencing under R.C. 2929.11 and balanced the seriousness and recidivism factors pursuant to R.C. 2929.12. Based upon the foregoing, we find that the disputed sentence was not clearly and convincingly contrary to law. Accordingly, appellant's fifth assignment of error is not well-taken.

{¶ 38} In his sixth assignment of error, appellant asserts that the trial court's errors, taken together, deprived him of his right to a fair trial under the constitutions of the state of Ohio and the United States. Appellant argues that the only effective remedy in this case is for this court to order the reversal of his conviction or a new trial.

{¶ 39} Before considering the effect of alleged "cumulative error," it is incumbent on this court to find that the trial court committed multiple errors. *State v. Keahy*, 6th Dist. Erie No. E-13-009, 2014-Ohio-4729, ¶ 66 (citations omitted). Having determined

that no such errors occurred, we find that the principle of cumulative error is inapplicable in this case. Accordingly, appellant's sixth assignment of error is not well-taken.

{¶ 40} 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.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
CONCUR.
JUDGE