[Cite as *State v. Shearer*, 2010-Ohio-1666.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92974

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LANDRA SHEARER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED; REMANDED
FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-510282

BEFORE: Cooney, J., Kilbane, P.J., and Blackmon, J.

RELEASED: April 15, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant, Landra Shearer ("Shearer"), appeals his convictions. Finding no merit to his arguments, we affirm his convictions but remand for resentencing.

{¶ 2} In April 2008, Shearer was charged in a five-count indictment with one count of attempted murder, two counts of felonious assault, and two counts of having a weapon while under disability. All counts included firearm and forfeiture specifications. The case proceeded to a jury trial, at which the following evidence was presented.

{¶ 3} On May 5, 2008, Cleveland police responded to a neighbor dispute on West 95th Street. Officer David Morova ("Morova") testified that he and his partner were dispatched to the scene because children from Antonio Stubblefield's ("Stubblefield") home had been throwing rocks into Claressa Hasan's ("Hasan") yard.[1] Shearer had gone to the Stubblefield home to demand that the children stop. Stubblefield, angered by Shearer's intrusion into his home, escorted Shearer outside and continued arguing with him until the police arrived.

{¶ 4} Shearer told police that he had shot a man before and would not mind shooting a man again. His statement was heard by many witnesses. The police ordered the families back into their homes and instructed them to leave each other alone. When the situation appeared calm, the police left the scene.

[1]Hasan is Shearer's sister.

{¶ 5} Shortly thereafter, Stubblefield's wife, Charisse, went out on her front porch to smoke a cigarette. While she was outside, Shearer yelled insults at her. Stubblefield's daughter, Jasmine, went back into the house and informed her father that Shearer was calling her mother obscenities.

{¶ 6} Stubblefield confronted Shearer about the insults to his wife and invited Shearer to resolve the matter with a fist fight in the street. Instead, Shearer ran to Hasan's back yard. Stubblefield directed his children back to his own house when Shearer reappeared. One of Stubblefield's daughters observed Shearer holding a gun and screamed, "Daddy, look out." When Stubblefield turned to look, Shearer shot him in the arm and face and immediately fled the scene.

{¶ 7} Hasan testified that while she was trying to break up the fight, Stubblefield grabbed her braids and dragged her away from the children. Hasan further testified that Stubblefield was shot as he grabbed her hair and held something shiny in his hand. The other witnesses, including defense witnesses Ella Shearer and Keena Dessasure ("Dessasure"), testified that they never saw Stubblefield with a knife.

{¶ 8} At the conclusion of the trial, the jury found Shearer guilty of attempted murder, with both firearm specifications and the forfeiture specification attached, and both felonious assault charges with all the firearm and forfeiture specifications. The weapon under disability charges (and accompanying firearm

and forfeiture specifications) as well as the repeat violent offender specifications were bifurcated from the jury trial. The trial court found Shearer guilty of one count of having a weapon while under disability and guilty on all the accompanying specifications. Shearer was sentenced to a total of 18 years in prison and 5 years of postrelease control.

{¶ 9} Shearer now appeals, raising three assignments of error.

{¶ 10} In the first assignment of error, Shearer argues the trial court erred when it allowed the State, over his objection, to introduce evidence of Shearer's statement to police that he had previously shot a man and would shoot again. Shearer argues this evidence created bias and was unfairly prejudicial.

{¶ 11} The statement Shearer made was heard by several witnesses. Shearer opened the door to the admission of this evidence by arguing self-defense. He put his emotional and mental state and the circumstances of that evening at issue for the jury to consider whether the alleged provocation was sufficient to justify his use of deadly force.

{¶ 12} "Threats made by an accused can constitute verbal acts in terms of Evid.R. 404(B)." *State v. Sargent* (1998), 126 Ohio App.3d 557, 567, 710 N.E.2d 1170. We find the trial court properly allowed the witnesses to testify about Shearer's boasting earlier in the evening pursuant to Evid.R. 404(B). This boast was directly related to proof of intent or plan as permitted by Evid.R. 404(B).

{¶ 13} Moreover, there was overwhelming evidence to convict Shearer even excluding the testimony concerning Shearer's statement to police about having shot a man. Several witnesses testified that they saw Stubblefield walking with his children toward his house when Shearer appeared with a gun and shot him. Defense witnesses Ella Shearer and Dessasure testified that Stubblefield and Shearer were alone in the street when the shots were fired.

{¶ 14} Even if it were error to allow this testimony, we find that it was not so prejudicial as to constitute reversible error. Error in the admission of evidence is harmless if there is no reasonable possibility that exclusion of the evidence would have affected the result of this trial. *State v. Webb* (1994), 70 Ohio St.3d 325, 335, 638 N.E.2d 1023, reconsideration denied, *State v. Webb* (1994), 70 Ohio St.3d 1472, 640 N.E.2d 845; see, also, Crim.R. 52(A) (any error will be deemed harmless if it does not affect the defendant's substantial rights).

{¶ 15} With so many eyewitnesses to the actual shooting, there is no reasonable possibility that this testimony, even if deemed inadmissible, contributed to Shearer's convictions.

{¶ 16} Therefore, the first assignment of error is overruled.

{¶ 17} In the second assignment of error, Shearer argues the trial court erred when it refused to give jury instructions on self-defense and aggravated assault. Under Ohio law, self-defense is an affirmative defense. *State v. Williford* (1990), 49 Ohio St.3d 247, 249, 551 N.E.2d 1279. A defendant must meet the burden of going

forward with evidence of a nature and quality sufficient to raise an affirmative defense. See R.C. 2901.05; *State v. Cross* (1979), 58 Ohio St.2d 482, fn. 5, 391 N.E.2d 319; *State v. Abner* (1978), 55 Ohio St.2d 251, 379 N.E.2d 228. The trial court, as a matter of law, cannot give a jury instruction on an affirmative defense if a defendant fails to meet this burden. See *Cross* at fn. 5; *Abner* at 253-254; *State v. Melchior* (1978), 56 Ohio St.2d 15, 20, 381 N.E.2d 195.

{¶ 18} In *Williford*, the Ohio Supreme Court held that:

{¶ 19} "To establish self-defense, the defendant must show '* * * (1) * * * [he] was not at fault in creating the situation giving rise to the affray; (2) * * * [he] has [sic] 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 * * * force; and (3) * * * [he] must not have violated any duty to retreat or avoid the danger. * * *' The defendant is privileged to use that force which is reasonably necessary to repel the attack. '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.'" (Citations omitted and emphasis in original.)

{¶ 20} Further, "[i]f a person in good faith and upon reasonable grounds believes that a family member is in imminent danger of death or serious bodily harm, such person may use reasonably necessary force to defend the family member to the same extent as the person would be entitled to use force in self-defense." Id. In the instant case, several witnesses to the shooting

testified that the victim, Stubblefield, was walking his children back to his home and that he was not threatening anyone when Shearer shot him. Defense witness Ella Shearer testified that she and Hasan were safe inside the house when the shots were fired. Dessasure testified that when the shots were fired, Stubblefield and Shearer were the only two people in the street.

{¶ 21} Although Hasan testified that Stubblefield was holding her braids at the time of the shooting, the testimony of all the other witnesses contradicts her version. Moreover, Hasan admitted she never saw Stubblefield holding a knife. Thus, there is no evidence that there was any threat of imminent death or serious bodily harm to support a self-defense instruction.

{¶ 22} Shearer further argues the jury should have been given an instruction on the offense of aggravated assault because it is an inferior degree offense of felonious assault. The elements of felonious assault are set forth in R.C. 2903.11 which provides, in pertinent part:

> "(A) No person shall knowingly do either of the following:
> (1) Cause serious physical harm to another * * * ;
> (2) Cause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance."

Aggravated assault is defined in R.C. 2903.12 as:

> "(A) No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly:
> (1) Cause serious physical harm to another;

> (2) Cause or attempt to cause physical harm to another by means of a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code."

{¶ 23} In *State v. Deem* (1988), 40 Ohio St.3d 205, 533 N.E.2d 294, the Ohio Supreme Court held that "in a trial for felonious assault, where the defendant presents sufficient evidence of serious provocation, an instruction on aggravated assault must be given to the jury." Id. at paragraph four of the syllabus. However, if the evidence presented does not meet this test, an instruction on aggravated assault is not required. *State v. Shane* (1992), 63 Ohio St.3d 630, 632, 590 N.E.2d 272, citing *State v. Kidder* (1987), 32 Ohio St.3d 279, 282-283, 513 N.E.2d 311.

{¶ 24} In determining whether there was sufficient evidence of adequate provocation, the Ohio Supreme Court set forth a two-part inquiry in *State v. Mack*, 82 Ohio St.3d 198, 201, 1998-Ohio-375, 694 N.E.2d 1328. First, an objective standard must be applied to determine whether the alleged provocation is reasonably sufficient to bring on a sudden passion or fit of rage. "'In determining whether the provocation was reasonably sufficient * * * the court must consider the emotional and mental state of the defendant and the conditions and circumstances that surround him at the time.'" (Citation omitted.) Id. at 200. The provocation must be occasioned by the victim and "must be sufficient to arouse the passions of an ordinary person beyond the power of his or her control." *Shane* at 635. If the objective standard is met, the inquiry shifts to a subjective standard, to determine

whether the defendant in the particular case "actually was under the influence of sudden passion or in a sudden fit of rage." Id. at 634.

{¶ 25} Under the facts of this case, it is clear that the first prong of the objective standard of the provocation inquiry was not met. This was merely a neighbor dispute that began with children fighting. Although Stubblefield argued with Shearer during the course of the night and there is some evidence that Stubblefield grabbed Shearer's sister by her braids, there is no evidence to suggest the provocation was so great as to bring on a sudden passion or fit of rage that would justify the use of deadly force.

{¶ 26} Accordingly, the second assignment of error is overruled.

{¶ 27} In the third assignment of error, Shearer argues his convictions are against the manifest weight of the evidence. We disagree.

{¶ 28} In *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, the Ohio Supreme Court addressed the standard of review for a criminal manifest weight challenge, as follows:

> "The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541. In *Thompkins*, the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. Id. at 386, 678 N.E.2d 541. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing belief. Id. at 386-387, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive — the state's or the defendant's? We went on to hold that although there may be sufficient evidence to support a

> judgment, it could nevertheless be against the manifest weight of the evidence. Id. at 387, 678 N.E.2d 541. 'When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony.' Id. at 387, 678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652."

{¶ 29} In the instant case, Shearer was convicted of attempted murder, felonious assault and having a weapon while under disability. The record reflects that several people witnessed Shearer shoot the victim twice, while he was walking his children back to his house. Although Shearer claims he shot Stubblefield in self-defense and that he was provoked into an uncontrollable fit of rage, the evidence overwhelmingly suggests that at the time Shearer shot Stubblefield, there were no threats of harm to him or anyone else and no justification for the use of deadly force. Thus, we cannot say that the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction is against the manifest weight of the evidence.

{¶ 30} Accordingly, the third assignment of error is overruled.

{¶ 31} Shearer's convictions are affirmed; however, we sua sponte remand this case to the trial court for resentencing in light of *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937 and this court's decision in *State v. Crosby*, Cuyahoga App. No. 92807, 2010-Ohio-1584. In *Williams*, the Ohio Supreme Court held that felonious assault as defined in R.C. 2903.11(A)(2) is an allied offense of attempted murder as defined in R.C. 2903.02(A) and 2923.02.

As a result, a criminal defendant "may be found guilty of both offenses, [but] he may be sentenced for only one." Id. at ¶27.

{¶ 32} In the instant case, Shearer was charged and convicted of one count of attempted murder in violation of R.C. 2923.02/2903.02(A) and two counts of felonious assault in violation of R.C. 2903.11(A)(1) and R.C. 2903.11(A)(2), respectively. The record indicates that Shearer shot the victim twice although he was charged and convicted of three separate counts. The State retains the right to choose which of the allied offenses to pursue at sentencing. *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, paragraph one of the syllabus. Therefore, we remand this case for resentencing.

{¶ 33} Convictions affirmed. Case remanded for resentencing.

It is ordered that appellant and appellee share equally their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for resentencing.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

COLLEEN CONWAY COONEY, JUDGE

MARY EILEEN KILBANE, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR