[Cite as *State v. Bunch*, 2010-Ohio-515.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92863

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TRACY BUNCH

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-515895

BEFORE: Sweeney, J., Gallagher, A.J., and Stewart, J.

RELEASED: February 18, 2010

JOURNALIZED:
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JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Tracy Bunch ("defendant"), appeals his aggravated assault and domestic violence convictions. After reviewing the facts of the case and pertinent law, we affirm.

{¶ 2} On the evening of September 21, 2008, defendant got into an argument with his step-father, James McIntyre ("victim"), at 3706 Rolliston Avenue in Shaker Heights, Ohio. Victim and his wife had repeatedly told defendant not to come to the house. Defendant was living in the detached garage at the time. As the argument became heated, defendant left the house, went into the garage, broke the cable to the overhead door, and came back into the house through the side entrance. In the meantime, victim grabbed two knives and headed toward the side door. As defendant entered the house, he encountered victim, who had a knife in each hand, and defendant pushed victim down the uncarpeted basement stairs. Victim broke his left wrist and fractured a bone in his face, which required surgery.

{¶ 3} Victim testified that he has had a rocky relationship with defendant over the past 30 years, that defendant has been "put out" of the house multiple times, and that when defendant became angry, defendant could be hostile toward and threaten victim. Recently, defendant had been bragging about keeping guns in the garage. Asked what he was thinking when defendant went to the garage, victim testified "that [defendant] was going to get a gun." Victim testified that he then got the knives, "[b]ecause hearing him brag about the guns that he had, I was not going to take any chances anymore. I thought he was coming back with a gun."

{¶ 4} Defendant's mother testified that when defendant went to the garage during the argument with victim, she thought defendant was going to get a gun because he had been talking about guns and he showed her two guns. She also stated that it was difficult for her to testify against her son. "I don't want to see my son go away. I mean, he was defending himself, too, because if somebody came after me with a knife I would defend myself, too."

{¶ 5} Defendant's sister testified that she was in the basement when, from her viewpoint, she saw defendant push victim down the stairs. She also testified that after the incident, defendant stated, "He stuck me, he stabbed me."

{¶ 6} On September 24, 2008, defendant was indicted for felonious assault and domestic violence. On January 23, 2009, a jury found defendant guilty of aggravated assault in violation of R.C. 2903.12(A)(1), which is an inferior offense of felonious assault, and domestic violence in violation of R.C. 2919.25(A). The court sentenced defendant to 17 months in prison.

{¶ 7} Defendant appeals and raises two assignments of error for our review.

{¶ 8} "I. Defendant-appellant was denied due process of law and the right to trial by jury when the trial court precluded the defense from eliciting on cross-examination evidence that the defendant had acted in self-defense."

{¶ 9} Specifically, defendant argues that the court erred when it ruled inadmissible the arresting police officer's testimony about what defendant said to him after the incident. Defendant alleges that he told the officer he was acting in self-defense and that he pushed victim because victim came at him with a knife in

each hand. The court ruled this evidence inadmissible, stating that defendant could not use his own statements to establish self-defense unless he testified.

{¶ 10} We review a trial court's decision regarding admissibility of evidence under an abuse of discretion standard. *State v. Hymore* (1967), 9 Ohio St.2d, 122, N.E.2d 126. An abuse of discretion is a decision that is unreasonable, arbitrary, or unconscionable, rather than a mere error in judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.2d 217, 215 N.E.2d 384.

{¶ 11} The Ohio Supreme Court has held that "[i]nasmuch as self-defense is an affirmative defense requiring proof by a preponderance of the evidence, it is incumbent upon a defendant claiming self-defense to offer evidence tending to establish that defense, including, if necessary, his own testimony." *State v. Seliskar* (1973), 35 Ohio St.2d 95, 96, 298 N.E.2d 582, citing *State v. Champion* (1924), 109 Ohio St. 281, 142 N.E.2d 141.

{¶ 12} In the instant case, defendant elected to not testify; however, he sought to elicit testimony of what he said using other evidence. The State objected to this line of testimony because defendant would not be subject to cross-examination regarding the statements unless he took the stand to testify.

{¶ 13} Evid.R. 801(C) defines hearsay, which is inadmissible at trial, as "a statement other than one made by the declarant while testifying * * *, offered to prove the truth of the matter asserted." We conclude that defendant's statements to the officer are hearsay.[1]

[1]The State additionally notes that defendant's statements are hearsay under Evid.R. 801(D)(2), which applies only when one party introduces the opposing party's statement. Here, defendant is trying to introduce his own statement. See *State v.*

{¶ 14} Defendant argues that his statements fall under an exception to the rule against hearsay, because they are excited utterances, or, in the alternative, present sense impressions. See Evid.R. 803(1) and (2).

{¶ 15} A present sense impression is a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter unless circumstances indicate lack of trustworthiness." Evid.R. 803(1). An excited utterance is a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Evid.R. 803(2).

{¶ 16} The 1980 Staff Notes to Evid.R. 803 shed some light on when these hearsay exceptions are properly used: "The circumstantial guaranty of trustworthiness is derived from the fact that the statement is contemporaneous and there is little risk of faulty recollection, and it is made to another who is capable of verifying the statement at the time it is made." Additionally, a statement is admissible as hearsay, "provided it is so connected with the transaction as a whole that the utterance or act is regarded as an expression of the circumstances under which it was made rather than the narrative result of thought. To qualify as an excited utterance, consideration must be given to (a) the lapse of time between the event and the declaration, (b) the mental and physical condition of the declarant, (c) the nature of the statement, and (d) the influence of intervening circumstances. This exception derives its guaranty of

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Boroski (Jan. 16, 1992), Cuyahoga App. No. 59725; *State v. Gatewood* (1984), 15 Ohio App.3d 14, 472 N.E.2d 63; *State v. Beeson*, Montgomery App. No. 19312, 2002-Ohio-4341.

trustworthiness from the fact that declarant is under such state of emotional shock that his reflective processes have been stilled. Therefore, statements made under these circumstances are not likely to be fabricated."

{¶ 17} Ohio case law shows that, often, statements made by victims of crimes may be introduced as present sense impressions or excited utterances if they were made while the victim "was in fear and under the stress of a startling event * * * and were not the product of reflective thought." *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, at ¶94, 86. See, also, *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173.

{¶ 18} Evid.R. 803(1) and (2) also contemplate that statements made by witnesses who personally observe startling events may be admissible even though they are introduced as hearsay. See, e.g., *State v. Smith* (1997), 80 Ohio St.3d 89, 107-08, 684 N.E.2d 668.

{¶ 19} However, in the instant case, the nature of, and circumstances surrounding, defendant's statements to the police "indicate lack of trustworthiness" and undermine the purpose of the rule against hearsay. We find the case before us similar to *State v. Watkins* (1981), 2 Ohio App.3d 402, 405, 442 N.E.2d 478, in which the Tenth District Court of Appeals held that the "statement of a suspect who has slashed three people with a knife, made several hours after the incident, can hardly be deemed to be a trustworthy statement for the purposes of affording it an exception to the hearsay rule. The admissibility of such a statement would be a clear avoidance of the hearsay rule."

{¶ 20} Finally, we note that the court instructed the jury on defendant's claim of self-defense, stating that "there has been evidence from the witnesses and also from one of your statements on the 911 tape that was clear which would tend to support a self-defense claim." Therefore, the testimony in question from the arresting officer would have been cumulative of testimony by other witnesses indicating that victim had a knife in each hand.

{¶ 21} Accordingly, the court did not abuse its discretion when it precluded defendant from offering his own statement into evidence as hearsay. Defendant's first assignment of error is overruled.

{¶ 22} "II. The trial court erred when it admitted other acts testimony in violation of R.C. 2945.59, Evid.R. 404(B) and Mr. Bunch'[s] rights under Article I, Section 16 of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution."

{¶ 23} Specifically, defendant argues that the state relied on inadmissible "prior bad acts" evidence that defendant (1) recently had or talked about having guns, and (2) previously threatened the victim, to prove that defendant assaulted victim in this case. The State, on the other hand, argues that it presented evidence of guns and threats to show the victim's state of mind.

{¶ 24} Evid.R. 404(B) states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." See, also, R.C. 2945.59.

{¶ 25} In the instant case, defendant was convicted of aggravated assault in violation of R.C. 2903.12(A), which states that "[n]o 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 * * *." Defendant was also convicted of domestic violence in violation of R.C. 2919.25(A), which states that "[n]o person shall knowingly cause or attempt to cause physical harm to a family or household member."

{¶ 26} Victim, defendant's mother, and defendant's sister testified that defendant had recently talked about keeping guns in the garage. Defendant showed the guns to his mother and sister. All three also testified that defendant had a history of arguing and threatening the victim, including a threat defendant made immediately before walking to the garage and back on the day in question, i.e., defendant stated that he did not care if his mother called 911 because of what he could do to the victim before the authorities arrived.

{¶ 27} We find that this evidence was properly admitted, as it was not used as character evidence. Rather, the testimony was used to demonstrate that defendant acted in "sudden passion," a "sudden fit of rage," or under "serious provocation * * * by the victim," all of which are elements of aggravated assault. Furthermore, the testimony was used to show victim's state of mind, which is relevant to domestic violence offenses.

{¶ 28} In *State v. Mack* (1998), 82 Ohio St.3d 198, 694 N.E.2d 1328, the Ohio Supreme Court held the following: "In *State v. Shane* (1992), 63 Ohio St.3d 630, we elaborated on what constitutes 'reasonably sufficient' provocation in the context of voluntary manslaughter. 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. That is, the provocation must be 'sufficient to arouse the passions of an ordinary person beyond the power of his or her control.' If this 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 634-635. We also held in *Shane* that words alone will not constitute reasonably sufficient provocation to incite the use of deadly force in most situations. Id., paragraph two of the syllabus." *Mack*, supra, at 201.

{¶ 29} In *State v. Seitz*, Portage App. No. 2001-P-0123, 2003-Ohio-1879, the Eleventh District Court of Appeals held that the victim's testimony regarding the defendant's gun ownership was admissible in an aggravated menacing and domestic violence case. "The fact that appellant had guns was highly relevant * * * and the probative value of this testimony is outweighed by any prejudice to appellant. The testimony also is relevant to establishing [the victim's] state of mind. Specifically, establishing that [the victim] was in fear of actual physical harm as she was aware that appellant owned guns." Id. at ¶23.

{¶ 30} In the instant case, by requesting a jury instruction on aggravated assault, as an inferior offense of felonious assault, defendant necessarily opened

the door to evidence of his and the victim's historically stormy relationship, including defendant's threatening behavior and talk of guns. The court did not abuse its discretion by admitting this testimony and defendant's second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant its 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 Court of Common Pleas 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 execution of sentence.

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

JAMES J. SWEENEY, JUDGE

MELODY J. STEWART, J., CONCURS;
SEAN C. GALLAGHER, A.J., CONCURS
IN JUDGMENT ONLY AS TO THE
FIRST ASSIGNMENT OF ERROR;
AND CONCURS FULLY AS TO THE
SECOND ASSIGNMENT OF ERROR

SEAN C. GALLAGHER, A.J., CONCURRING IN JUDGMENT ONLY AS TO THE FIRST ASSIGNMENT OF ERROR AND CONCURRING FULLY AS TO THE SECOND ASSIGNMENT OF ERROR:

{¶ 31} I concur in judgment only with the majority as to the first assignment of error and concur fully with the majority regarding the second assignment of error.

{¶ 32} Regarding the first assignment of error, I would find that defendant's statements to police were admissible as excited utterances since they were made immediately after the event while the defendant was still "agitated, aggravated and disturbed." Nevertheless, I would find the error to be harmless because there was other evidence in the record that the victim came at the defendant with two knives and because a self-defense instruction was given to the jury.