[Cite as *State v. Smith*, 2010-Ohio-653.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90478

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STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ROXANNE SMITH

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Application for Reopening
Motion No. 423986
Cuyahoga County Common Pleas Court
Case No. CR-497079

RELEASE DATE: February 23, 2010

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MELODY J. STEWART, J.:

{¶ 1} In *State v. Smith*, Cuyahoga County Court of Common Pleas Case No. CR-497079, applicant, Roxanne Smith, was found guilty by a jury and convicted of murder and two counts of felonious assault. This court affirmed that judgment in *State v. Smith*, Cuyahoga App. No. 90478, 2009-Ohio-2244.

{¶ 2} Smith has filed with the clerk of this court a timely application for reopening. She asserts that she was denied the effective assistance of appellate counsel because: 1) her appellate counsel did not assign error "from a federal constitutional perspective," Application at 2; 2) appellate counsel did not assign as error that "the trial court erred by giving an incorrect jury instruction on the element of self defense, specifically, the duty to retreat," Id.; and 3) appellate

counsel did not assign as error that “the trial court erred by not permitting appellant to introduce character evidence of the victim, specifically, the victim’s propensity for violence,” Id.

{¶ 3} Having reviewed the arguments set forth in the application for reopening in light of the record, we hold that Smith has failed to meet her burden to demonstrate that "there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5). In *State v. Spivey*, 84 Ohio St.3d 24, 1998-Ohio-704, 701 N.E.2d 696, the Supreme Court specified the proof required of an applicant. "In *State v. Reed* (1996), 74 Ohio St.3d 534, 535, 660 N.E.2d 456, 458, we held that the two prong analysis found in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, is the appropriate standard to assess a defense request for reopening under App.R. 26(B)(5). [Applicant] must prove that his counsel were deficient for failing to raise the issues he now presents, as well as showing that had he presented those claims on appeal, there was a 'reasonable probability' that he would have been successful. Thus [applicant] bears the burden of establishing that there was a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal." Id. at 25.

{¶ 4} Smith cannot satisfy the *Strickland* test. We must, therefore, deny the application on the merits. As required by App.R. 26(B)(6), the reasons for our denial follow.

{¶ 5} Smith's first proposed assignment of error states: "Appellate counsel was ineffective for not raising the assignment of errors from a federal constitutional perspective thus, barring federal review because of a procedural [sic] bar." Application, at 3. On direct appeal, however, appellate counsel assigned one assignment of error which stated: "Trial counsel rendered ineffective assistance of counsel, in violation of Ms. Smith's rights under the Sixth and Fourteenth Amendments to the U.S. Constitution. T.p. 348, 351, 383-84, 387, 389-90, 443-44, 475, 680-81." Clearly, appellate counsel included precisely what Smith contends was missing. Smith's first proposed assignment of error is not, therefore, well-taken.

{¶ 6} In her second proposed assignment of error, Smith asserts that her appellate counsel was ineffective for failing to assign as error that "the trial court erred by giving an incorrect jury instruction on the element of self defense, specifically, the duty to retreat." Application, at 4. The record does reflect, however, that the trial court instructed the jury extensively on self-defense. Tr. at 1001-1007.

{¶ 7} After reading the charge on self-defense, the trial court asked: "Are we solid with that self-defense instruction?" Tr. at 1007. Smith's trial counsel and the prosecutor separately answered "Yes." It is well-established that a party's failure to object to a jury instruction waives all objections unless there is plain error. "Pursuant to Crim.R. 52(B), this court may, in the absence of objection, notice plain errors or defects that affect a defendant's substantial

rights. But to rise to the level of plain error, the alleged error must have substantially affected the outcome of the trial. *State v. Slagle* (1992), 65 Ohio St.3d 597, 604-605, 605 N.E.2d 916." *State v. Carman*, 8th Dist. No. 90512, 2008-Ohio-4386, at ¶12. Smith must, therefore, demonstrate that the purported error in the jury instructions is plain error.

{¶ 8} "Under Ohio law, self-defense is an affirmative defense. *State v. Martin* (1986), 21 Ohio St.3d 91, 21 OBR 386, 488 N.E.2d 166, affirmed *Martin v. Ohio* (1987), 480 U.S. 228, 107 S.Ct. 1098, 94 L.Ed.2d 267. 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. * * *' *State v. Robbins* (1979), 58 Ohio St.2d 74, 12 O.O.3d 84, 388 N.E.2d 755, paragraph two of the syllabus. The defendant is privileged to use that force which is reasonably necessary to repel the attack. *State v. McLeod* (1948), 82 Ohio App. 155, 157, 37 O.O.3d 522, 522-23, 80 N.E.2d 699, 700. '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.) *State v. Jackson* (1986), 22 Ohio St.3d 281, 284, 22 OBR 452, 455, 490 N.E.2d 893, 897, certiorari denied (1987), 480 U.S. 917, 107 S.Ct. 1370, 94 L.Ed.2d 686." *State v. Williford* (1990), 49 Ohio St.3d 247, 249, 551 N.E.2d 1279.

{¶ 9} Although the trial court did instruct the jury on the three elements of self-defense, Smith insists that the trial court should have also instructed the jury that she had no duty to retreat because the incident giving rise to her conviction occurred in her home. She relies on the well-established principle that "[t]here is no duty to retreat from one's home. (*State v. Peacock* [1883], 40 Ohio St. 333, approved and followed.)" *Williford*, supra, paragraph two of the syllabus.

{¶ 10} In *Peacock*, the Supreme Court stated: "Where one is assaulted in his home, or the home itself is attacked, he may use such means as are *necessary* to repel the assailant from the house, or to prevent his forcible entry, or material injury to his home, even to the taking of life. But a homicide in such a case would not be justifiable unless the slayer, in the careful and proper use of his faculties, *bona fide believes*, and has reasonable ground to believe that the killing *is* necessary to repel the assailant or prevent his forcible entry." (Emphasis in original.) The circumstances in this case, however, are not comparable to those described in *Peacock*.

{¶ 11} "The trial testimony revealed the following facts. The victim, Johnnie Smith, was Roxanne's uncle. By all accounts, Johnnie had a substance abuse problem and a history of violence, particularly when he was under the influence of alcohol and/or drugs.

{¶ 12} "At the time of the murder, Johnnie and Roxanne were not on good terms, because on a prior occasion Johnnie had been at Roxanne's house, got sick from drinking too much, and vomited on her couch and carpet. Roxanne

became upset, ordered Johnnie out of her house, and told him that he was not welcome there again. Johnnie's wife testified that prior to the murder, Roxanne showed her a gun that Roxanne kept in her home and specifically stated that she 'had it because of Johnnie.'

{¶ 13} "Nonetheless, Johnnie attended a cookout at Roxanne's house on the day of the murder. He drank alcoholic beverages, eventually got sick, and vomited in the living room. Roxanne put a bucket in front of Johnnie and pushed his head down into it. Johnnie became angry at Roxanne, and the two engaged in a verbal altercation.

{¶ 14} "At some point during the altercation, Roxanne left the living room and returned with a gun. One witness, who unsuccessfully attempted to take the gun away from Roxanne, described her as being 'just like in a rage, a high rage.' The witness also described that when Johnnie saw Roxanne with the gun, Johnnie had a 'fighting' and 'aggressive' look.

{¶ 15} "Another witness testified that Roxanne pointed the gun at Johnnie and backed away from him. According to the witness, Johnnie eventually stood up, and walked toward Roxanne as he apologized to her. Roxanne continued to point the gun at him, and Johnnie said something to the effect of 'well then, just shoot me.' Roxanne did. Johnnie died from two gunshot wounds, one to the chest and the other to the abdomen.

{¶ 16} "Roxanne testified. She described that when Johnnie was finished vomiting, he 'jumped up' and she then backed away from him because he had 'a

crazy look on his face.' According to Roxanne, it was at that point that she got her gun and returned to the living room. She continuously asked him to leave, but he came toward her, so she tried to shoot him in the leg to 'stop him,' and scare him into leaving, but missed. When he continued to come toward her, she shot him twice. Roxanne testified that she believed Johnnie was going to 'sucker punch' her and use the gun against her and, therefore, she feared for her life." *Smith*, 2009-Ohio-2244, at ¶3-8.

{¶ 17} Clearly, this is not a case of an assailant entering a house. Rather, the facts in this case are comparable to those in *State v. Berger*, 8th Dist. No. 87603, 2006-Ohio-6583. Ashley Berger was convicted of stabbing two women, one of whom died. "* * * Berger exited her house and observed the struggle between the families [her family and a neighbor's family]. It was at that time, prior to any threat being issued by Barkley [Berger's next door neighbor] or McMorick [Barkley's sister], that Berger made the decision to retrieve a knife from the kitchen. There is no dispute that no one else had a weapon. When Berger commenced stabbing with the knife, McMorick [who died], Barkley [who was injured], and Berger were engaged in cussing, hair pulling, shoving, and punching. No one was exerting lethal force. Thus, Berger had no basis for a 'bona fide belief that [she] was in imminent danger of death or great bodily harm' and could 'escape from such danger' only by using deadly force." *Berger*, supra, at ¶19, citation deleted.

{¶ 18} In *Berger*, there was conflicting evidence whether Berger stabbed the victims on her porch or her front walkway. This court concluded that – even if the trial court did err by failing to instruct the jury that Berger did not have a duty to retreat into her home – Berger would not have prevailed on her claim of self-defense.

{¶ 19} As noted above, a defendant must prove all of the elements of self-defense. That is, "the elements of self-defense are cumulative." *Jackson*, supra, at 284. The *Jackson* and *Berger* courts both concluded that the respective defendants did not prove either or both of the other two elements of self-defense that: the defendant was not at fault in causing the situation; and the defendant was in imminent danger of bodily harm and the only means of escape was the use of force. As a consequence, the absence of an instruction that the defendant did not have a duty to retreat was not prejudicial. *Jackson*, supra, at 284; *Berger*, supra, at ¶20.

{¶ 20} As was the case in *Berger*, Smith left the area where the initial confrontation occurred and returned with a weapon. No one else had a weapon. Similarly, in *Jackson*, the defendant left the victim outside, entered his apartment house and, as the victim walked up the porch stairs, Jackson shot the victim. "It is evident that in the case sub judice, the jury heard the witnesses, weighed the evidence, and rejected appellant's contention that he had a bona-fide belief that he was in imminent danger of death or great bodily harm. There was substantial

evidence to support the jury's conclusion that appellant had not proved this element of self-defense.

{¶ 21} "Although a special instruction from the trial court on appellant's duty to retreat would have been appropriate to the evidence adduced at trial, we conclude that the failure to give such an instruction neither affected appellant's substantial rights nor contributed to his conviction. Crim.R. 52(A); *Chapman v. California* (1967), 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705. As demonstrated by the foregoing, the jury simply rejected appellant's theory of self-defense." *Jackson*, supra, at 285.

{¶ 22} In light of these authorities, Smith is unable to demonstrate that she has been prejudiced by the failure of the trial court to instruct the jury that she did not have a duty to retreat. She clearly contributed to escalating the altercation. She left the room, returned with a weapon and refused to let another person have the weapon.

{¶ 23} *Jackson* and *Berger* require us to conclude that Smith was not prejudiced by the absence of an assignment of error contending that the trial court should have instructed the jury that she had no duty to retreat. Trial counsel did not object when the trial court asked specifically regarding the self-defense instruction. Smith must demonstrate plain error resulting from the absence of an instruction that she did not have a duty to retreat. Smith cannot meet her burden to demonstrate that there is a genuine issue as to whether she has a colorable claim of ineffective assistance of counsel on appeal. As a

consequence, we cannot conclude that there was a reasonable probability that Smith would have been successful if she had presented this claim on direct appeal. Smith's second proposed assignment of error is not, therefore, well-taken.

{¶ 24} In her third proposed assignment of error, Smith complains that appellate counsel did not assign as error that "the trial court erred by not permitting appellant to introduce character evidence of the victim, specifically, the victim's propensity for violence." Application at 2. Yet, as quoted above: "By all accounts, Johnnie [the victim] had a substance abuse problem and a history of violence, particularly when he was under the influence of alcohol and/or drugs." *Smith,* 2009-Ohio-2244, at ¶3. On cross-examination, trial counsel elicited testimony from several witnesses regarding Johnnie's aggressive and violent behavior. Smith's third proposed assignment of error is not, therefore, well-taken.

{¶ 25} Accordingly, the application for reopening is denied.

MELODY J. STEWART, JUDGE

SEAN C. GALLAGHER, A.J., and
MARY J. BOYLE, J., CONCUR