[Cite as *State v. Stoutemire*, 2011-Ohio-473.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94802

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JAMAL R. STOUTEMIRE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-528607

BEFORE: Cooney, J., Stewart, P.J., and Keough, J.

RELEASED AND JOURNALIZED: February 3, 2011

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COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant, Jamal Stoutemire ("Stoutemire"), appeals his aggravated assault conviction. Finding no merit to the appeal, we affirm.

{¶ 2} In September 2009, Stoutemire was indicted with two codefendants, Wilburn Foster ("Foster") and Dominique Allen ("Allen") on six counts. Counts 1 and 3 charged defendants with felonious assault, pursuant to R.C. 2903.11(A)(1). Counts 2, 4, and 5 charged them with felonious assault, pursuant to R.C. 2903.11(A)(2). Count 6 charged them with aggravated robbery, pursuant to R.C. 2911.01(A)(3).

{¶ 3} Defendants proceeded to a jury trial in January 2010, at which the following evidence was adduced.

{¶ 4} On August 25, 2009, Daniel and Brandy Stover ("Daniel" and "Brandy") headed home after attending a family barbeque at Daniel's parents' home, Jeffrey and Linda Smith ("Jeffrey" and "Linda"). Daniel and Brandy cut through a back alley on their way to the bus stop. Daniel testified that they passed Amanda Dotson ("Dotson"), Allen, and Stoutemire. Dotson began to make comments about Brandy related to a dispute the two had a week prior.

{¶ 5} Daniel began to argue with Dotson, while Brandy returned to Daniel's parents' home. Stoutemire approached Daniel and interjected himself into the verbal altercation and threw a bottle at Daniel. Daniel then threw a stick at Stoutemire. The two began to wrestle in the street. Foster came from his home and approached the two men as they fought. The fight broke up, and Foster and Stoutemire returned to their homes, leaving Daniel in the street.

{¶ 6} Brandy and Daniel's father, Jeffrey, approached Daniel. At the same time, Foster, carrying two machetes, and Stoutemire, carrying a fire extinguisher, returned to the street. A fight ensued, during which Foster was struck in the head with the fire extinguisher and knocked unconscious. Conflicting testimony exists as to whether Daniel struck Foster, or whether Stoutemire accidentally struck Foster.

{¶ 7} Regardless, Stoutemire then struck Jeffrey in the head with the fire extinguisher, knocking him unconscious as well. Stoutemire then dropped the extinguisher and picked up the two machetes. Daniel attempted to flee, but Stoutemire pursued him. Daniel tripped and fell. As he turned to get up, Stoutemire swung a machete at him, slicing his hand.

{¶ 8} Daniel testified that another woman named Teresa grabbed one of the machetes and sliced his shoulder, and then began, along with Dotson, to kick and beat his father, Jeffrey, while they emptied Jeffrey's pockets.

{¶ 9} Daniel ran to his parents' home, and his mother, Linda, called 911. EMS and police arrived on the scene and transported Daniel to the hospital, where he underwent a nine-hour surgery to repair his hand.

{¶ 10} At the end of the trial, defense counsel moved for judgment of acquittal. The motion was granted as to Stoutemire on Count 5, as to Foster on Counts 5 and 6, and granted for Allen on all counts.

{¶ 11} After deliberations, Foster was found not guilty on all remaining counts. The jury found Stoutemire not guilty of the original charges, but found him guilty as to Count 1, on the lesser included offense of aggravated assault. He was sentenced to one year in prison.

{¶ 12} Stoutemire appeals, raising three assignments of error.

Manifest Weight of the Evidence

{¶ 13} In his first assignment of error, Stoutemire contends that his aggravated assault conviction is against the manifest weight of the evidence.

{¶ 14} A challenge to the manifest weight of the evidence attacks the verdict in light of the State's burden of proof beyond a reasonable doubt. *State v. Thompkins*, 78 Ohio St.3d 380, 386-87, 1997-Ohio-52, 678 N.E.2d 541. When inquiring into the manifest weight of the evidence, the reviewing court sits as the "thirteenth juror and makes an independent review of the record." Id. at 387; *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652. The appellate court reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of all witnesses and determines whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new proceeding ordered. *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶ 15} Where a judgment is supported by competent, credible evidence going to all essential elements to be proven, the judgment will not be reversed as being against the manifest weight of the evidence. *State v. Mattison* (1985), 23 Ohio App.3d 10, 14, 490 N.E.2d 926. Accordingly, reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶ 16} Stoutemire was convicted of aggravated assault, pursuant to R.C. 2903.12(A)(1), which states:

{¶ 17} "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 cause serious physical harm, to another or another's unborn."

{¶ 18} Stoutemire argues that numerous inconsistencies exist between the testimony of Daniel, Brandy, and Jeffrey in terms of the events of the night in question. At trial, all three admitted that their testimony was inconsistent with their initial statements given to police. Jeffrey admitted to inconsistencies, claiming his wife wrote the majority of his statement, and he signed it without reviewing it.

{¶ 19} Despite these inconsistencies, the one element of testimony that remained consistent throughout was that Stoutemire cut Daniel's hand with a machete. Paramedics and officers who responded to the scene testified that they found Daniel bleeding profusely. The extent of Daniel's serious injuries are evident from testimony and medical records.

{¶ 20} No evidence was produced at trial, or argued by Stoutemire in his brief, to prove that anyone other than Stoutemire cut Daniel's hand. It is clear from the verdict that the jury was not convinced of many of the elements of the charges Stoutemire faced, finding him not guilty of the original charges. It is clear, however, that based on the testimony and

evidence presented, the jury was confident that Stoutemire had committed aggravated assault against Daniel Stover.

{¶ 21} In weighing the credibility of witnesses and the totality of evidence presented, this case is not the exceptional one requiring reversal. In finding Stoutemire guilty of aggravated assault, the jury did not lose its way and create a miscarriage of justice. Stoutemire's conviction is not against the manifest weight of the evidence.

{¶ 22} Accordingly, the first assignment of error is overruled.

Right to Confront

{¶ 23} In his second assignment of error, Stoutemire argues that his Sixth Amendment right to be confronted with witnesses against him was violated. He contends that the trial court erred in admitting Linda Stover's 911 call.

{¶ 24} Linda Stover did not testify during Stoutemire's trial. Her son Daniel testified that she was unavailable, having recently been released from the hospital. Daniel identified his mother's voice on the recording. In addition, the police dispatcher who answered Linda's 911 call, identified her own voice on the recording.

{¶ 25} Stoutemire, through counsel, objected to the admission of this evidence when offered by the State at trial. The court overruled his objection, citing *Davis v. Washington* (2006), 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224.

{¶ 26} Stoutemire argues that the trial court committed plain error because Linda's statements during the 911 call were testimonial, and thus violated the Confrontation Clause.

{¶ 27} In *Crawford v. Washington* (2004), 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177, the United States Supreme Court held that the Confrontation Clause encompasses "testimonial" as opposed to nontestimonial evidence. Although the Court did not define "testimonial," the court discussed three possible definitions of that term, which include: (1) ex parte in-court testimony or its functional equivalent, such as affidavits and prior testimony that the defendant was unable to cross-examine, or pretrial statements that declarants would reasonably be expected to be used in a prosecution; (2) extra-judicial statements contained in formal testimonial materials such as depositions, prior testimony, or confessions; and (3) statements made under circumstances that would lead an objective witness to believe the statement would be available for use at a later trial. Id. at 51-52.

{¶ 28} In *Davis v. Washington*, the United States Supreme Court further considered the meaning of the term "testimonial." The Court found that the Confrontation Clause applies only to testimonial hearsay and not to statements made "to enable police assistance to meet an ongoing emergency." Id. at 2277. In *Davis*, the victim had made a 911 emergency call, and in the course of that call incriminated the defendant. The Supreme Court, in affirming the lower court's admission of the statements, held that:

> "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later prosecution." Id. at 2273-2274.

{¶ 29} In the case of 911 calls, the *Davis* court reasoned that declarants are typically facing ongoing emergencies and are speaking about events as they are actually happening. Id. at 2276. It follows, that under these exigent circumstances, callers are not testifying as witnesses; thus, their statements do not qualify as testimonial in nature. The *Davis* court held that the admission of 911 calls of this nature does not violate the Confrontation Clause when the witness is not available to testify. Id.

{¶ 30} As was the case in *Davis*, we find that Linda told the 911 dispatcher what had happened for the purpose of meeting an ongoing emergency, and not for purposes of a later prosecution. Under the totality of the circumstances, when Linda called 911, she was not acting as a testifying witness, and her statements do not qualify as testimonial in nature.

{¶ 31} Our analysis does not end here, however, because we must determine if Linda's 911 call falls under one of the exceptions to the hearsay rule. Proffered hearsay may be admitted where it "falls within a firmly rooted hearsay exception." *State v. McKenzie*, Cuyahoga App. No. 87610, 2006-Ohio-5725, citing *Ohio v. Roberts* (1980), 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597.

{¶ 32} Evid.R. 803(2) defines an "excited utterance" as "[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." Four prerequisites must be satisfied in order for an excited utterance to be admissible: (1) an event startling enough to produce a nervous excitement in the declarant, (2) the statement must have been made while still under the stress of excitement caused by the event, (3) the statement must relate to the startling event, and (4) the declarant must have personally observed the startling event. See *State v. Brown* (1996), 112 Ohio App.3d 583, 601, 679 N.E.2d 361.

{¶ 33} It is apparent from the record in this case that the State laid a proper foundation for admission of Linda's statement as an excited utterance. The evidence reflects that she was still under the excitement of a series of startling events involving her son and husband. Her son was bleeding profusely and eventually passed out due to the loss of blood. Her statement related to the startling event. We find the statement had the requisite guarantees of trustworthiness and was part of a series of excited utterances.

{¶ 34} Therefore, we find no plain error and conclude that Linda's statements during her 911 call were nontestimonial and appropriately admitted as excited utterances. Stoutemire's second assignment of error is overruled.

Ineffectiveness of Counsel

{¶ 35} In his third assignment of error, Stoutemire contends that he received ineffective assistance of counsel.

{¶ 36} To reverse a conviction for ineffective assistance of counsel, the defendant must prove "(1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding." *State v. Madrigal*, 87 Ohio St.3d 378, 388-389, 2000-Ohio-448, 721 N.E.2d 52, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 104 S.Ct. 2052, 80 L.Ed.2d 674.

{¶ 37} As to the second element of the test, the defendant must establish "that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus; *Strickland* at 686. In evaluating whether a petitioner has been denied effective assistance of counsel, the Ohio Supreme Court held that the test is "whether the accused, under all the circumstances, had a fair trial and substantial justice was done." *State v. Hester* (1976), 45 Ohio St.2d 71, 341 N.E.2d 304, paragraph four of the syllabus.

{¶ 38} Stoutemire argues that he received ineffective assistance of counsel because his counsel failed to request a jury instruction on self-defense. 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.

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

> "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.)

{¶ 40} In the instant case, Stoutemire called no witnesses, nor did he take the stand in his own defense. No evidence was produced at trial to indicate that he did not instigate the physical fight. Daniel and Brandy both testified that Stoutemire interjected himself into the verbal argument between Daniel and Dotson, turning it into a physical brawl.

{¶ 41} Moreover, no evidence was presented to show that Stoutemire had no means of escape. Daniel testified that he was the one running from the scene, while Stoutemire pursued him until Daniel fell. Daniel testified that at one point Stoutemire returned to his

home; no evidence was presented, however, to show that he was unable to return to his home again later in the fight.

{¶ 42} Stoutemire failed to meet his burden to show evidence of possible self-defense. Having failed to meet this burden, the trial court had no basis to give an instruction on self-defense even if Stoutemire's counsel had requested it.

{¶ 43} Therefore, counsel did not err in failing to request a jury instruction on self-defense, because there was insufficient evidence to merit such a request. Accordingly, Stoutemire has failed to establish that his counsel's performance fell below an objective standard of reasonableness, and that counsel's performance prejudiced his ability to receive a fair trial.

{¶ 44} Therefore, the third assignment of error is overruled.

Judgment is affirmed.

It is ordered that appellee recover of appellant 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 execution of sentence.

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

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COLLEEN CONWAY COONEY, JUDGE

MELODY J. STEWART, P.J., and
KATHLEEN ANN KEOUGH, J., CONCUR