[Cite as *State v. Davis*, 2016-Ohio-5630.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103906

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ROMAINE TONY DAVIS

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-15-597396-A

BEFORE: Celebrezze, J., Keough, P.J., and E.A. Gallagher, J.

RELEASED AND JOURNALIZED: September 1, 2016

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FRANK D. CELEBREZZE, JR., J.:

{¶1} Appellant, Romaine Tony Davis, appeals his felonious assault conviction that resulted from the stabbing of William Wainwright. Appellant claims his conviction must be overturned because at least one member of the jury found that he acted in self-defense. After a thorough review of the record and law, this court agrees and reverses and remands for a new trial.

I. Factual and Procedural History

{¶2} On July 9, 2015, Wainwright and appellant saw each other at FX Fitness in Maple Heights, Ohio. Wainwright had been a member of the gym for only a few weeks, while appellant had been working out there for several years. As Wainwright was heading down the stairs from the second floor, appellant was heading up. The two exchanged words.

{¶3} This was another in a history of hostile encounters going back some time. The animosity between the two resulted from an incident that occurred many years before. They first met working as delivery personnel for retail stores in the early 2000s. When the two were out delivering large appliances, a fight occurred where Wainwright punched appellant and drove off in a work truck the two were sharing that day. Appellant called police and informed them that Wainwright had threatened him with a knife. Wainwright admitted to punching appellant, but denied threatening him with a knife. Wainwright was not convicted of any charges related to the incident after

appellant failed to come forward to testify.

{¶4} When the two ran into each other unexpectedly at FX Fitness, those hostilities boiled over. Appellant testified that Wainwright tried to push him down the stairs as they passed each other. According to appellant, Wainwright then went to the main entrance of the facility and exited with two other people he perceived as friends of Wainwright. Appellant then went upstairs and saw a friend of his. He asked this person to accompany him downstairs and out to his truck even though he had just arrived at the gym. When appellant exited the building with his friend, he testified Wainwright was waiting for him outside. He further testified the other two people with Wainwright were not around. Upon exiting, appellant testified Wainwright squared up to him in a fighting stance. The two then exchanged punches.

{¶5} Wainwright testified he saw appellant on the stairs in the facility. After the two exchanged words on the stairs, appellant chased Wainwright outside. Once outside, Wainwright turned, squared up to appellant, and the two began to fight. After dodging a few blows thrown by appellant, Wainwright saw appellant pull a knife from a pocket and then used it to attack him, stabbing him in the abdomen. After being stabbed, Wainwright ran back into the gym. A woman working at the front desk witnessed the stabbing and corroborated Wainwright's version of events. She testified that she never saw Wainwright with a knife, and she further testified that she thought Wainwright did not even have any pockets in the workout suit he was wearing.

{¶6} Appellant testified that when he and Wainwright started fighting, Wainwright

kept reaching in his pocket, trying to retrieve something. Eventually, Wainwright pulled out a knife and attacked appellant with it. Appellant then pulled out the work knife he had in his pocket and used it to defend himself. He admitted to stabbing Wainwright, but said he was defending himself.

{¶7} Appellant's version of events was corroborated by a gym patron and friend of appellant's. He testified that he witnessed the fight from a second-floor window of the gym. He stated that he saw Wainwright attacked appellant with a knife. His testimony differed from appellant's in that he stated Wainwright was helped by two friends during the attack. The gym employee and appellant testified that the only other person they saw outside around the two combatants was a single friend of appellant's.

{¶8} Following the stabbing, appellant ran to a nearby fire station and called police. Gym employees also called police, and Wainwright was taken to the hospital and treated for a knife wound in his abdomen.

{¶9} Appellant was arrested and charged with two counts of felonious assault under R.C. 2903.11(A)(1) and 2903.11(A)(2), respectively. The case proceeded to a jury trial. At its conclusion, appellant was found guilty of both counts. After merger, the trial court made the necessary findings in order to impose community control and imposed that sanction for two years, as well as a $1,000 fine.

{¶10} Appellant then filed the instant appeal assigning three errors for review:

> I. The trial court erred and violated [appellant's] state and federal due process rights to a fair trial and a unanimous jury verdict when it instructed the jury that it must find [appellant] guilty of felonious assault if it could not agree on self-defense.

> II. The trial court erred and violated [appellant's] state and federal due process right to a fair trial and a unanimous jury verdict when it failed to comply with Criminal Rule 31(D) after polling of the jury established that the verdict was not unanimous.
>
> III. The trial court erred and violated [appellant's] state and federal constitutional rights to a fair trial and a unanimous jury verdict when it accepted a verdict of guilt despite lack of unanimity on whether [appellant] acted in self-defense.

II. Law and Analysis

{¶11} All of appellant's assigned errors turn on whether a jury must unanimously find that an affirmative defense is applicable. Therefore, that is the question that will be addressed. In the process of doing so, the individual elements of appellant's three assigned errors will be addressed as is necessary.

{¶12} Crim.R. 31(A) requires that all verdicts in criminal trials shall be unanimous. Further, R.C. 2901.05(A) provides,

> [e]very person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.

{¶13} In the present case, the jury received instructions from the court, including a

proper unanimity instruction, and retired to deliberate. After some time, the jury returned with a question about self-defense. The jury asked if it must unanimously find that appellant acted in self-defense. The trial court had lengthy discussions with the parties and ultimately gave the following instruction over appellant's objection:

> So what I have done, ladies and gentlemen, in order to — for you to reach your — to make your findings and to reach your verdicts, I have replaced — and I'm sorry if I've confused you, but I've replaced your second sheet regarding the consideration of self-defense with these instructions:
>
> Number one, if you unanimously find the defendant proved by a preponderance of the evidence the affirmative defense of self-defense, proceed to the next page and enter a finding of not guilty.
>
> Second instruction. If you cannot unanimously find the defendant proved by a preponderance of the evidence the affirmative defense of self-defense, proceed to the next page and enter guilty as to this count.

{¶14} The United States Supreme Court recognized, but did not resolve, the ambiguity created by the standard unanimity instruction when paired with an affirmative defense in *McKoy v. North Carolina*, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990). There, the court was reviewing the constitutionality of the unanimity requirement in North Carolina's capital sentencing system. *Id*. at 435. In a concurring opinion addressing the dissenting opinion, Justice Blackmun wrote,

> The dissent's analogy presumes that once the elements of an offense have been proved, the jury's failure to agree as to an affirmative defense results in a conviction (just as a North Carolina jury's failure to agree as to the presence of a given mitigating factor creates a "finding" that the factor is not present); but our cases do not say that, and it is not at all clear that a conviction, rather than a hung jury, would be the outcome. *See State v. Harris*, 89 R.I. 202, 207, 152 A.2d 106, 109 (1959) (although the defendant bears the burden of proof as to insanity, "there is a vast difference between an instruction as to the persuasiveness of evidence and an instruction as to

> *agreement*. If the jury could not agree upon defendant's sanity then no verdict could be reached")

(Emphasis sic.) *McKoy* at 450-451 (Blackmun, J., concurring).

{¶15} The Ninth Circuit went on to analyze the issue in the context of sanity to stand trial. *United States v. Southwell*, 432 F.3d 1050, 1054 (9th Cir.2005). After recognizing the disagreement raised in *McKoy*, the court analyzed state court cases on point and arrived at a conclusion that an affirmative defense must be accepted or rejected unanimously:

> If a juror finds that the government has proven each element of the offense beyond a reasonable doubt, and also finds that the defendant has not proven insanity by clear and convincing evidence, he must find the defendant guilty. If another juror finds that the government has proven each element of the offense beyond a reasonable doubt, but also finds that the defendant has proven insanity by clear and convincing evidence, he must find the defendant not guilty by reason of insanity. Since a jury verdict must be unanimous, a jury united as to guilt but divided as to an affirmative defense (such as insanity) is necessarily a hung jury.

Id. at 1055.

{¶16} In *Southwell*, the jury asked for clarification on the issue of an affirmative defense and whether it had to be unanimously found. In response, the trial court failed to issue any clarifying order. The Ninth Circuit found that was error: "The jurors asked the court whether they could convict Southwell if they were unanimous on guilt but divided as to sanity. * * * [T]he correct answer was 'no.' The district court's failure to answer the jury's question left open the possibility that they convicted Southwell even though they were divided as to sanity." *Id*. The essential issue addressed in *Southwell* is the same as that in the present case.

{¶17} Ohio is unusual in that self-defense has to be proved by the defendant in a criminal trial whereas all other states place the burden on the state to disprove self-defense. *Martin v. Ohio*, 480 U.S. 228, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987) (The court recognized South Carolina and Ohio as the only states, but since the decision, South Carolina has joined the other states in requiring the state to disprove self-defense when properly raised. *State v. Wiggins*, 330 S.C. 538, 544, 500 S.E.2d 489 (1998)). This makes cases in other states dealing with the affirmative defense of self-defense and unanimity rare because self-defense is not an affirmative defense where the defendant has the burden of proof. Therefore, cases dealing with other affirmative defenses, such as insanity, are helpful.

{¶18} In the present case, the court's supplemental instruction was an erroneous interpretation of the unanimity requirement because it allowed the jury to deliver a guilty verdict without unanimous agreement.[1]

{¶19} Rhode Island addressed the question in the context of the affirmative defense of insanity. *Harris*, 89 R.I. 202, 152 A.2d 106 (1959). There, it recognized,

> "[i]n criminal cases this requirement of unanimity extends to all issues—character or degree of the crime, guilt and punishment—which are left to the jury. A verdict embodies in a single finding the conclusions by

[1]Even in a civil trial applying the preponderance of the evidence standard, if a proper majority of a civil jury found that a defendant had satisfied the elements of an affirmative defense, the defendant would avoid liability. However, in this case, the court's instruction means that even where all but one juror believed that appellant acted in self-defense, he would still be found guilty.

> the jury upon all the questions submitted to it." *Andres v. United States*, 333 U.S. 740, 748, 92 L.Ed. 1055, 68 S.Ct. 880 [(1948)]. The jury's determination on an insanity defense is as demanding of unanimity as is the determination on the plea of not guilty. *People v. Chamberlain*, 7 Cal.2d 257, 60 P.2d 299 [(1936)].

Id. at 207.

{¶20} A Hawaii court also held:

> If the jurors unanimously agreed that all the elements of the charged offense have been proved beyond a reasonable doubt but are unable to reach unanimous agreement as to the affirmative defense of entrapment, no unanimous verdict can be reached as to the charged offense because some jurors would vote for conviction and others for acquittal. In such instance, a mistrial would have to be declared due to the hung jury.

State v. Miyashiro, 90 Haw. 489, 979 P.2d 85 (1999).

{¶21} These cases are in agreement with the Ninth Circuit's reasoning and hold that an affirmative defense that does not conflict with one of the elements of an offense must be unanimously rejected before a guilty verdict can be rendered. The trial court's instruction created a lack of unanimity contrary to Crim.R. 31(A). Indeed, Crim.R. 31(A) requires unanimous verdicts regardless of who has the burden of proof. Nothing in Crim.R. 31 limits the unanimity requirement to those things that must be proved by the state. The difference in the evidentiary standard created by R.C. 2901.05(A) between

the state and a defendant does not displace Crim.R. 31's unanimity requirement. The interaction between R.C. 2901.05(A) and Crim.R. 31 is not one of exclusion. The statute and the rule do not conflict and both apply, but to different aspects of criminal procedures. Crim.R. 31 applies to all issues sent to the jury for decision, including the applicability of an affirmative defense, unless specifically excluded by rule or statute. R.C. 2901.05(A) does not do so.

{¶22} Here, the jury unanimously agreed that the state met its burden of proof. That was not difficult given that appellant admitted to stabbing Wainwright. It then considered whether appellant acted in self-defense. The jury could not reach unanimous agreement. In the normal situation based on the standard unanimity instruction, the jury's finding of guilt is an implicit rejection of the affirmative defense because the unanimity instruction requires the jury to act as one. However, in the present case, it is apparent that the jury did not reach unanimous agreement on the issue. During the poll of the jury following the verdict, one juror indicated they could not reach agreement on self-defense. The record is clear that there was no unanimous verdict in this case.

{¶23} The state acknowledges that, in Ohio, no court has specifically addressed the issue of whether an affirmative defense must be accepted or rejected unanimously. It cites to *State v. Ware*, 8th Dist. Cuyahoga No. 57546, 1990 Ohio App. LEXIS 4404 (Oct. 11, 1990), for support of its position that the court properly instructed the jury, that there was unanimous agreement as to appellant's guilt, and the verdicts should stand. However, that case is not helpful.

{¶24} In *Ware*, this court rejected an argument that an incorrect jury verdict form that stated not less than three-fourths of the jurors agreed in the verdict of guilt meant that the verdict was not unanimous. *Id*. at 13. However, it was clear from the record that all the jurors agreed to the verdict when polled. *Id*. Further, no objection was raised below and the error was not preserved for appellate review. *Id*. That is not the case here. Appellant properly objected to the further instructions of the court in chambers prior to the instruction being given, and then again outside the presence of the jury after the instruction was given. This case presents the opposite scenario from *Ware*. Here, the jury confirmed that it had not reached a unanimous verdict. In *Ware*, the verdict form, although incorrect, was signed by all 12 jurors unanimously agreeing on guilt.

{¶25} The state also cites to a Ninth District case it claims is instructive. *State v. Mosley*, 9th Dist. Summit No. 12034, 1985 Ohio App. LEXIS 9015 (Oct. 16, 1985). There, the appellant objected to a statement made by the prosecutor in closing arguments that should the jury fail to unanimously agree on whether the defendant proved self-defense, then the defendant failed to prove self-defense and should be found guilty. *Id*. at 12. The trial court in that case stated on the record that the prosecutor's statement was incorrect and that a hung jury would result. *Id*. The Ninth District analyzed the jury instructions that included a standard unanimity instruction, and noted it was not incorrect and no objection was raised about it. *Id*. at 13. The court then turned to the prosecutor's statement. Without any analysis whatsoever, the Ninth District determined that the prosecutor's statement was not a clear misstatement of the law. *Id.*

{¶26} This decision could have rested on the fact that whether an affirmative defense must be unanimously found was an unanswered question in the jurisprudence of this state, and therefore, the prosecutor's statement was not clearly erroneous. In any event, the case does not address the actual question presented here, and the lack of any analysis set forth by the Ninth District makes it of little precedential value.

{¶27} Appellant's three assignment of errors are sustained.

III. Conclusion

{¶28} While R.C. 2901.05 places the burden of proof on a defendant to establish an affirmative defense, that does not impact Crim.R. 31(A)'s requirement that a criminal verdict be unanimous. Here, at least one juror would have found appellant not guilty based on an affirmative showing of self-defense. The court's instruction that all jurors must find appellant guilty unless they unanimously accepted appellant's self-defense argument was given in error. Therefore, this case must be remanded for a new trial.

{¶29} This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover of said appellee 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.

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

FRANK D. CELEBREZZE, JR., JUDGE

KATHLEEN ANN KEOUGH, P.J., and
EILEEN A. GALLAGHER, J., CONCUR