

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-220471
	:	TRIAL NO. B-2102719
Plaintiff-Appellee,	:	
	:	
VS.	:	
	:	<i>OPINION.</i>
ROGERICK MITCHELL,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: July 28, 2023

Melissa A. Powers, Hamilton County Prosecuting Attorney, and *Philip R. Cummings*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Arenstein & Gallagher and *Elizabeth Conkin*. for Defendant-Appellant.

BERGERON, Presiding Judge.

{¶1} Some bickering between two men outside of a gas station escalated quickly, leading to weapons being drawn and the eventual death of Daniel Johnson. Defendant-appellant Rogerick Mitchell shot Mr. Johnson twice in the melee, leading to his indictment for murder. At a jury trial, Mr. Mitchell pursued a self-defense argument that ultimately failed, leading to a guilty verdict for felony murder and tampering with evidence—Mr. Mitchell was also later found guilty in a bench trial of having weapons under disability. He appeals his conviction for felony murder on sufficiency and manifest weight grounds. Having carefully reviewed the evidence and the record, and in light of this state’s new “stand your ground” law, we agree with him. We accordingly reverse his murder conviction as against the manifest weight of the evidence and remand the matter for a new trial. As his appeal does not challenge the tampering with evidence or weapons under a disability convictions, we have no occasion to consider those convictions, and they are not implicated by our new trial ruling.

I.

{¶2} In May 2021, Mr. Mitchell arrived at a BP gas station managed by Lucky Singh. Mr. Singh was sitting outside chatting on the phone, and he informed Mr. Mitchell that the pumps and his computer were down, requiring him to temporarily close the gas station. Mr. Singh later testified that he recognized Mr. Mitchell as a regular customer of the gas station. Mr. Singh eventually went back inside the gas station, locking the door behind him.

{¶3} As Mr. Mitchell stood by the entrance, apparently waiting to see when or if it would reopen, Mr. Johnson approached the gas station and attempted to

open the locked door. According to Mr. Singh, Mr. Mitchell informed Mr. Johnson that the store was closed. Mr. Johnson responded that he understood, but sought to enter the store because his “family is inside.” According to Mr. Singh, the employee working with him that day was Misty Brunner, Mr. Johnson’s girlfriend of three years. However, Ms. Brunner testified at trial that she was *not* working that day but had actually driven to the gas station with Mr. Johnson. According to her, the couple were dog sitting for Ashley Corbett, who was the actual employee working with Mr. Singh at the time. Ms. Brunner had apparently received a call from Ms. Corbett requesting that she return her dog to her, prompting Ms. Brunner and Mr. Johnson to drive to the gas station.

{¶4} Mr. Singh then heard the two men get into an argument outside—he heard Mr. Johnson say, “I have a knife,” and Mr. Mitchell say, “I have a gun,” although he could not remember which individual spoke first. And although Mr. Singh could not make out the specifics of the dispute, he heard the two swearing at one another, growing louder as they argued.

{¶5} According to Mr. Mitchell, he approached Mr. Johnson, who moved his keys from his right hand to his left and then placed his free hand in his right front pocket. Mr. Mitchell placed his hand in his left jacket pocket (where he had his gun), but soon after dropped his empty left hand and let both of his arms hang at his side. Thereafter, Mr. Johnson drew his knife from his right pocket, took a step towards Mr. Mitchell, and thrust his knife towards Mr. Mitchell’s face, but without making contact. In response, Mr. Mitchell drew his gun.

{¶6} Mr. Mitchell then walked up to Mr. Johnson and pointed his gun at him before pistol-whipping him across the head. In retaliation, Mr. Johnson

advanced towards Mr. Mitchell and stabbed him in the abdomen with his knife. After being stabbed, Mr. Mitchell fired his first shot at Mr. Johnson, hitting him in the torso. Notwithstanding the gunshot, Mr. Johnson sought to advance on Mr. Mitchell again with his knife in hand. Mr. Mitchell shot Mr. Johnson a second time, causing him to collapse on the ground.

{¶7} Mr. Johnson was transported to University Hospital where he died two days later. Mr. Mitchell also sought treatment at a local hospital, under an assumed name, for his stab wound. Apparently, Mr. Mitchell also tried to sell his gun and asked his girlfriend to lie for him about the incident. After Mr. Johnson's death, Cincinnati police took Mr. Mitchell into custody. Mr. Mitchell was indicted on five counts related to the shooting.

{¶8} Video surveillance from the gas station captured the entire confrontation, and this video was presented to the jury. After a week-long trial in July 2022, the jury found Mr. Mitchell guilty of felonious assault in violation of R.C. 2903.11, felony murder—predicated on the felonious assault—in violation of R.C. 2903.02(B), and concealing of a firearm while an official investigation was in progress in violation of R.C. 2921.12(A)(1), notwithstanding his self-defense argument. After a separate bench trial, the court found Mr. Mitchell guilty of having a weapon under disability in violation of R.C. 2923.13(A)(2).

{¶9} At sentencing, the court imposed an aggregate sentence of 25 years to life—18 years to life for the felony murder count (after it was merged with the felonious assault charge), 4 years for tampering with evidence, and 3 years for having weapons under disability. Mr. Mitchell now appeals, arguing that his convictions for felonious assault and felony murder were based on legally

insufficient evidence and were against the manifest weight of the evidence. He does not appeal his convictions for tampering with evidence and having weapons under disability.

II.

{¶10} First, Mr. Mitchell maintains that after reviewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found that the state proved any of the exceptions to the defense of self-defense set forth in R.C. 2901.05 beyond a reasonable doubt. The state largely responds that this court should decline to consider the sufficiency of the evidence with respect to self-defense, insisting that *State v. Messenger*, Slip Opinion No. 2022-Ohio-4562, clarified that the correct standard is manifest weight.

{¶11} Mr. Mitchell endeavors to distinguish his case from *Messenger*, emphasizing the lack of any jury instruction regarding whether he met any burden of proof. According to him, because the jury did not have to decide whether he satisfied his burden of proof, the jury instructions implied that the state's burden of proof in a self-defense case is tantamount to making it an element of the crimes alleged.

{¶12} We do not find Mr. Mitchell's argument persuasive. As the Ohio Supreme Court explained, "a defendant charged with an offense involving the use of force has the burden of producing legally sufficient evidence that the defendant's use of force was in self-defense." *Messenger* at ¶ 25. And because the trial court provided the jury with a correct instruction regarding self-defense, it necessarily concluded that Mr. Mitchell presented sufficient evidence of self-defense. *See id.* at ¶ 26 ("At the close of [defendant's] jury trial, the trial court provided the jury with an instruction regarding self-defense, which means that the trial court concluded that [defendant]

put forward sufficient evidence that he was acting in self-defense when he shot and killed [victim].”).

{¶13} Therefore, the state does not bear the burden of production on self-defense, and “ ‘it follows that sufficiency of the evidence is not the proper framework to review whether the state proved the absence of self-defense.’ ” *State v. Walker*, 2021-Ohio-3860, 180 N.E.3d 60, ¶ 61 (6th Dist.), quoting *State v. Messenger*, 2021-Ohio-2044, 174 N.E.3d 425, ¶ 44 (10th Dist.). The Ohio Supreme Court underscores the point: “The state’s new burden of disproving the defendant’s self-defense claim beyond a reasonable doubt is subject to a manifest-weight review on appeal * * *.” *Messenger*, Slip Opinion No. 2022-Ohio-4562, at ¶ 27. We accordingly overrule Mr. Mitchell’s first assignment of error and reject his sufficiency claim.

III.

{¶14} As instructed by *Messenger*, we will accordingly review Mr. Mitchell’s self-defense claim through a manifest weight lens. This brings us to his second assignment of error.

{¶15} When a defendant raises a manifest weight of the evidence challenge, they ask us to consider whether the state carried its burden of persuasion before the trial court. *Messenger* at ¶ 26; *State v. Martin*, 170 Ohio St.3d 181, 2022-Ohio-4175, 209 N.E.3d 688, ¶ 26. Unlike the burden of production, which concerns a party’s duty to introduce *enough* evidence on an issue, the burden of persuasion represents a party’s duty to convince the factfinder to view the facts in a favorable manner to them. *Messenger* at ¶ 17. In order for us to second-guess the factfinder’s adjudication of conflicting evidence, which we reserve for only the most exceptional circumstances,

we must conclude that the evidence weighs heavily against conviction. *State v. Thompson*, 78 Ohio St.3d 380, 387, 388, 678 N.E.2d 541 (1997).

{¶16} “[I]f there is evidence presented at trial that tends to support that the defendant used force against another in self-defense or in defense of another, *the state* must prove beyond a reasonable doubt that the defendant did not use the force in self-defense or defense of another.” (Emphasis added.) *State v. Gibson*, 1st Dist. Hamilton No. C-220283, 2023-Ohio-1640, ¶ 10, quoting *State v. Smith*, 1st Dist. Hamilton No. C-190507, 2020-Ohio-4976, ¶ 49. “‘Once the initial showing is made, the burden of persuasion requires the state to disprove at least one of the elements of self-defense * * * beyond a reasonable doubt.’” *Id.*

{¶17} “‘The elements of self-defense in the use of deadly force are: (1) the defendant was not at fault in creating the situation giving rise to the affray; (2) the defendant had a bona fide belief that she was in imminent danger of death or great bodily harm and that her only means of escape from such a danger was in the use of such force * * *.’” *State v. Wilson*, 1st Dist. Hamilton No. C-210535, 2022-Ohio-3801, ¶ 10, quoting *Smith* at ¶ 48. The recently amended “stand your ground” law in Ohio now indicates that “a person has no duty to retreat before using self-defense * * * if that person is in a place in which the person lawfully has a right to be.” R.C. 2901.09(B). “Simply put, the new ‘stand your ground’ law removes, in most cases, the duty to retreat before using self-defense.’” *State v. Degahson*, 2d Dist. Clark No. 2021-CA-35, 2022-Ohio-2972, ¶ 15.

{¶18} We recognize that this amendment to R.C. 2901.09, promulgated in April 2021, *see State v. Robinette*, 2023-Ohio-5, 205 N.E.3d 633, ¶ 51 (5th Dist.), creates a substantial change regarding how Ohio courts previously analyzed self-

defense arguments.¹ Since Mr. Mitchell lawfully had a right to be at the BP station, we turn to consider the other two elements for self-defense.

A.

{¶19} The first prong of a self-defense claim, in order for the state to disprove self-defense on behalf of the defendant, is to establish beyond a reasonable doubt that the defendant “was at fault in creating the situation giving rise to the affray * * *.” *Gibson*, 1st Dist. Hamilton No. C-220283, 2023-Ohio-1640, at ¶ 11. “The ‘not at fault’ requirement * * * means that the defendant must not have been the first aggressor in the incident.” *State v. Turner*, 171 Ohio App.3d 82, 2007-Ohio-1346, 869 N.E.2d 708, ¶ 23 (2d Dist.), citing *State v. Robbins*, 58 Ohio St.2d 74, 388 N.E.2d 755 (1979).

{¶20} Concerning this element, the state at trial highlighted that Mr. Mitchell chose to move closer to Mr. Johnson to continue to confront him during the altercation, rendering him the initial aggressor. Further, it emphasized the pistol-whipping as the precursor to the stabbing.

{¶21} While Mr. Mitchell acknowledges that he did initially walk towards Mr. Johnson (before either individual drew a weapon), he highlights the security video which shows that Mr. Johnson grabbed his knife first. At that moment, Mr. Mitchell’s hands were at his side, and yet Mr. Johnson took out his knife and thrust it at him, prompting Mr. Mitchell to draw his gun. We find that this critical development supports the position that Mr. Johnson, rather than Mr. Mitchell, bore responsibility for commencing the affray. *See, e.g., In re C.L.*, 197 Ohio App.3d 514, 2011-Ohio-6892,

¹ This case painfully illustrates the violence that the “stand your ground” law will beget and condone in our state. Mr. Mitchell could have easily retreated from the confrontation and no one would have been hurt. Under the former law, therefore, he would not have had a meritorious self-defense claim. The new law radically transforms that and will encourage and reward violent confrontations.

968 N.E.2d 34, ¶ 26 (4th Dist.) (“[T]he trial court explicitly found [defendant] was not at fault in creating the violent situation, as [victim] threw the first punch.”); *State v. Hendrickson*, 4th Dist. Athens No. 08CA12, 2009-Ohio-4416, ¶ 1 (“[Defendant] did not threaten or use any physical violence against [victim]; yet, there is some evidence that [victim] responded to [defendant’s] non-deadly aggression by stabbing him twice in the abdomen with a knife. Because [victim] was not legally entitled to use deadly force * * *, [defendant’s] ‘fault’ in starting a verbal confrontation did not preclude him from defending himself against the potentially deadly attack. Thus, the trial court erred in finding against [defendant] on the ‘not-at-fault’ element.”).

{¶22} The state counters by emphasizing the pistol-whipping, claiming that Mr. Johnson stabbing Mr. Mitchell flowed from Mr. Mitchell’s assault. Perhaps, but the violent affray began when Mr. Johnson initially sought to stab Mr. Mitchell. He escalated the situation from a verbal confrontation into a physical altercation. *See State v. Wagner*, 3d Dist. Seneca No. 13-15-18, 2015-Ohio-5183, ¶ 21 (“[Defendant] is correct that [victim] * * * initially created the situation giving rise to the affray. But [defendant] overlooks that the evidence demonstrated that he *escalated* the situation from a verbal confrontation to a physical altercation.”) (Emphasis sic.). If Mr. Johnson had not brandished his knife in close proximity to Mr. Mitchell, we would agree with the state.

{¶23} We must mention that any confusion by the jury here could be attributed to a mischaracterization by the state during closing argument. The state claimed that Mr. Johnson merely pointed his finger at Mr. Mitchell, rather than his knife, in an effort to paint Mr. Mitchell as the initial aggressor when he pistol-whipped Mr. Johnson. The video flatly refutes that point. Mr. Johnson only reached into his

pocket once, immediately before the moment in question. And there is no question that he stabbed Mr. Mitchell—Mr. Mitchell’s blood was found on the knife. In other words, the knife was out of his pocket from the get-go, and any suggestion that Mr. Johnson merely pointed a finger is inaccurate.

B.

{¶24} The second element of self-defense involves both objective and subjective considerations. *Smith*, 1st Dist. Hamilton No. C-190507, 2020-Ohio-4976, at ¶ 56, citing *State v. Vanover*, 1st Dist. Hamilton No. C-990104, 2000 Ohio App. LEXIS 4469, 3 (Sept. 29, 2000). A defendant’s belief that he was in immediate danger of death or great bodily harm must be objectively reasonable, and the defendant must have an honest belief that he faced such danger. *Id.*

{¶25} “[I]f the objective standard is met, the jury must determine if, subjectively, this particular defendant had an *honest* belief that she was in imminent danger.” (Emphasis sic.) *State v. Thomas*, 77 Ohio St.3d 323, 331, 673 N.E.2d 1339 (1997). “ ‘Courts have held that when lethal force is used in self-defense, the perceived threat to the accused must be of death or great bodily harm.’ ” *State v. Sims*, 8th Dist. Cuyahoga No. 85608, 2005-Ohio-5846, ¶ 16, quoting *State v. Dietz*, 8th Dist. Cuyahoga No. 81823, 2003-Ohio-3249, ¶ 10.

{¶26} The state may disprove self-defense by demonstrating that the defendant’s belief was not objectively reasonable or that he did not have an honest subjective belief that he faced imminent death or great bodily harm. *Smith* at ¶ 56. The state argues that Mr. Mitchell’s fear was objectively unreasonable because he had a gun when Mr. Johnson had a knife, and because he fired two shots, the second when Mr. Johnson was stumbling to the ground.

{¶27} But Mr. Johnson stabbed Mr. Mitchell in the abdomen with a knife, which is more than just a threat of deadly force, but the *actual* infliction of great bodily harm that could have resulted in death—and even required hospital treatment. And contrary to the state’s characterization, the surveillance video demonstrates that Mr. Mitchell took a second shot at Mr. Johnson only after he again lunged towards Mr. Mitchell with his knife.

{¶28} Because Mr. Mitchell sustained great bodily harm at the hands of Mr. Johnson when he was stabbed, he was privileged to defend himself. Therefore, we believe Mr. Mitchell had an objective and subjective belief that he was in such danger to use deadly force.

{¶29} While we are reticent to overturn a jury’s findings on manifest weight grounds, our review of the evidence leads us to conclude that the state failed to prove beyond a reasonable doubt that Mr. Mitchell was at fault for creating the situation giving rise to the affray. Our review of the record—and in particular the video evidence—indicates that the evidence weighed heavily against a conviction. *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541. We accordingly sustain Mr. Mitchell’s second assignment of error.

* * *

{¶30} In light of the foregoing analysis, we find that Mr. Mitchell’s murder conviction is against the manifest weight of the evidence. We therefore reverse the trial court’s judgment convicting him of murder, and remand the matter for a new trial. Again, this ruling does not implicate the tampering with evidence or weapons under a disability convictions, which were not challenged on appeal.

Judgment reversed and cause remanded.

BOCK and KINSLEY, JJ., concur.

Please note:

The court has recorded its entry on the date of the release of this opinion.