[Cite as *State v. Bean*, 2003-Ohio-2962.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 19483
v.	:	T.C. CASE NO. 01 CR 3641
MARTINEZ BEAN	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 6th day of June, 2003.

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FREDERICK N. YOUNG, J.

{¶1} Martinez Bean is appealing the judgment of the Montgomery County Common Pleas Court, which convicted him of felonious assault.

{¶2} On October 24, 2001, Mr. Bean, along with his mother, Joanne Cochran, and stepfather, Dwain Cochran, had a conversation with their former landlord, Kenneth

Seabrook. Mrs. Cochran confronted Mr. Seabrook because she was missing a welfare check, which had been cashed. Mr. Seabrook made a movement as if he were going to strike Mrs. Cochran with a cup that was in his hand. According to Mr. Cochran, Mr. Bean pushed his mother out of the way, and a "tussle" broke out between Mr. Cochran, Mr. Bean, and Mr. Seabrook. Mr. Seabrook was injured in the fight and went to the hospital. Mr. Seabrook on the contrary testified that Mr. Bean had pulled a gun out of his sweat pants, pointing it at Mr. Seabrook. Further, Mr. Seabrook testified that during the fight Mr. Bean had struck him in the face with the butt of the gun, while Mr. Cochran had struck him with a breaker bar. Mr. Seabrook had been accompanied by Noah Driscoll, who witnessed the altercation along with Mr. Seabrook's girlfriend. Police responded to the scene, and Mr. Seabrook identified his assailants. As a result of the altercation, Mr. Seabrook suffered a broken blood vessel in his left eye, swelling, knots and scrapes over his face and head, bruising in his ribs, dizziness, and back pain.

{¶3} Mr. Bean was subsequently charged with one count of felonious assault with a deadly weapon in violation of R.C. 2903.11(A)(2). A jury trial was held on June 18-19, 2002, in which the State tried Mr. Bean and Mr. Cochran as co-defendants. Mr. Bean was found guilty as charged and sentenced to serve a five year term of incarceration. Mr. Bean has filed this appeal from the conviction, raising the following assignments of error:

{¶4} "I. THE TRIAL COURT'S ORDER OF CONTINUANCE AT THE REQUEST OF THE PROSECUTION VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL.

{¶5} "II. THE JURY VERDICT SHOULD BE REVERSED BECAUSE IT WAS

AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶6} "III. THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON THE AFFIRMATIVE DEFENSES OF SELF DEFENSE AND DEFENSE OF ANOTHER PREJUDICED APPELLANT AND VIOLATED HIS CONSTITUTIONAL RIGHTS."

Appellant's first assignment of error:

{¶7} Mr. Bean argues that the trial court abused its discretion in granting the State's motion for a continuance in the course of the trial. We disagree.

{¶8} A trial court has broad discretion over continuance requests, and its decision to grant or deny a motion for a continuance will not be reversed absent an abuse of discretion. *State v. Unger* (1981), 67 Ohio St.2d 65. An abuse of discretion amounts to more than a mere error of judgment or law; it requires a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶9} R.C. 2945.02 provides, "No continuance of the trial shall be granted except upon affirmative proof in open court, upon reasonable notice, that the ends of justice require a continuance." When determining whether to grant a motion for continuance, a trial court should consider the following relevant factors: "[1] the length of the delay requested; [2] whether other continuances have been requested and received; [3] the inconvenience to litigants, witnesses, opposing counsel and the court; [4] whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; [5] whether the defendant contributed to the circumstances giving rise to the request for a continuance; and [6] other relevant factors depending on the unique circumstances of each case." *Unger*, supra, at 67. If the reason for the

delay is to secure witnesses, the moving party must demonstrate that the witnesses would have given substantial favorable evidence and that they were available and willing to testify. *United States v. Boyd* (C.A. 6, 1980), 620 F.2d 129, 132.

{¶10} Mr. Bean argues that the trial court erred in granting the State's motion for a continuance. During the course of the trial, Mr. Seabrook left at a break in order to pick his daughter up from school. He was supposed to return that afternoon but failed to do so. (Tr. 80-81). The State requested a continuance until the following morning in order to secure the witness. (Tr. 80, 89-91). The State proffered that Mr. Seabrook, as the complaining witness, would offer material testimony and had continuously expressed an interest in testifying for the State. (Tr. 80, 90-91). After listening to the arguments, the trial court granted the State's request. Mr. Seabrook testified the next morning on behalf of the State. We do not agree with Mr. Bean that the trial court abused its discretion in granting the continuance. The State proffered evidence that Mr. Seabrook was a material witness and had been willing to testify. This was demonstrated by Mr. Seabrook's presence in the courtroom earlier in the trial. Additionally, the State's requested continuance was for a limited duration - until the following morning. We cannot say the trial court abused its discretion in granting the continuance. Mr. Bean's first assignment of error is without merit and is overruled.

Appellant's second assignment of error:

{¶11} Mr. Bean argues that his conviction for felonious assault was against the manifest weight of the evidence because the photographs do not support Mr. Seabrook's allegation that Mr. Bean struck him with the butt of a gun. We disagree.

{¶12} When a conviction is challenged on appeal as being against the manifest

weight of the evidence, we must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, and determine 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 conviction must be reversed and a new trial ordered." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 1997-Ohio-52, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. A judgment should be reversed as being against the manifest weight of the evidence "only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin*, supra, at 175.

{¶13} Mr. Bean was charged with felonious assault under R.C. 2903.11(A)(2), which provides, "[n]o person shall knowingly: * * * cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance." Mr. Bean argues that the evidence did not support his conviction of this charge as the photographs of Mr. Seabrook's injuries do not support his allegation that he was beaten with the butt of a gun. However, at trial, Mr. Seabrook testified that Mr. Bean had drawn a gun, had pointed it at him, and later had hit him with the gun in the back of the head and side of the face. (Tr. 107-108). Mr. Seabrook further displayed to the jury a scar on his head in the shape of the butt of a gun that he had received as a result of Mr. Bean's assault. (Tr. 121). Also, Noah Driscoll testified at trial that he had observed Mr. Bean pull out a gun, point it at Mr. Seabrook, and then hit Mr. Seabrook in the head with it. (Tr. 29-30, 33). We find that this amounts to competent, credible evidence to support Mr. Bean's conviction for felonious assault. His conviction is not against the manifest weight of the evidence. Mr. Bean's second assignment of error is without merit and is overruled.

Appellant's third assignment or error:

{¶14} Mr. Bean argues that the trial court erred in refusing to instruct the jury on the affirmative defenses of self defense and defense of another. We disagree.

{¶15} In order to determine whether a defendant has successfully raised an affirmative defense under R.C. 2901.05, the court is to inquire whether the defendant has presented sufficient "evidence, which, if believed, would raise a question in the minds of reasonable men concerning the existence of such issue." *State v. Robbins* (1979), 58 Ohio St.2d 74, 80, quoting *State v. Melchoir* (1978), 56 Ohio St.2d 15, paragraph one of the syllabus.

{¶16} In order to establish the affirmative defense of self-defense, Mr. Bean must show that 1) he was not at fault in creating the situation that gave rise to the assault, 2) he honestly and reasonably believed that he was in immediate danger of bodily harm, 3) his only means to protect himself was through the use of force, and 4) the defendant did not violate any duty to retreat or avoid the danger. *State v. Robbins,* supra, at paragraph two of the syllabus.

{¶17} Also, Ohio has long recognized an affirmative defense of defense of another where one 1) reasonably and in good faith believes that his family member is in imminent danger of death or serious bodily harm and 2) only uses reasonably necessary force to defend his family member such as he would be entitled to use in self-defense. *State v. Williford* (1990), 49 Ohio St.3d 247, 250.

{¶18} Mr. Bean argues that the trial court should have given instructions on self-defense and defense of another as he requested because Mr. Seabrook had made a movement as though he were going to strike Mrs. Cochran. Mr. Bean pushed her out

of the way of danger and was then left in a vulnerable position and had to defend himself. The only evidence presented that supported this argument was Mr. Cochran's testimony. Mr. Cochran testified that, during a heated discussion between Mr. Seabrook and Mrs. Cochran, Mr. Seabrook had motioned as if he were going to hit Mrs. Cochran with a plastic cup that was in his hand. According to Mr. Cochran, Mr. Bean pushed Mrs. Cochran out of the way, and a "tussle" broke out between Mr. Cochran and Mr. Seabrook, during which time Mr. Bean struck Mr. Seabrook with his fist. Mr. Cochran testified that Mr. Seabrook had fallen several times and then he and Mr. Bean had left.

{¶19} Mr. Bean argues that the defense of another instruction should have been given because he was defending his mother, Mrs. Cochran. However, Mr. Cochran testified that, after Mr. Bean had pushed her out of the way, he and Mr. Seabrook had tussled. At this point, Mrs. Cochran was no longer in danger, and Mr. Bean had no need to defend Mrs. Cochran from Mr. Seabrook. As Mrs. Cochran was no longer in imminent danger, she would not have been justified in using force, and Mr. Bean acting in her defense was not justified either. Additionally, because according to Mr. Cochran's testimony Mr. Cochran and Mr. Seabrook were the parties involved in a tussle, Mr. Bean was not in imminent danger either. Therefore, Mr. Bean would not have been justified in using force to defend himself. Thus, the trial court did not err in refusing to grant Mr. Bean's request for a jury instruction on defense of another or self-defense. Mr. Bean's third assignment of error is without merit and is overruled.

{¶20} The judgment of the trial court is affirmed.

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BROGAN, J. and GRADY, J., concur.

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