[Cite as *State v. Sheffield*, 2004-Ohio-4123.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 20085

vs. : T.C. CASE NO. 02CR2314

HAROLD SHEFFIELD, JR. : (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 August, 2004.

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GRADY, J.

{¶1} Defendant, Harold Sheffield, Jr., appeals from his conviction for carrying concealed weapons in violation of R.C. 2923.12(A). Sheffield argues that the trial court erred when it rejected application of the affirmative defense provided by division (C)(2) of R.C. 2923.12. We do

not agree, and accordingly will affirm Sheffield's conviction.

{¶2} Sheffield was stopped at about 10:00 p.m., on July 1, 2002, by Dayton Police Officer Patricia Pasquel, after he failed to yield the right of way to Officer Pasquel's police cruiser. Sheffield had just exited the area of Parkside Homes in Dayton. Sheffield told Officer Pasquel that he didn't see her coming because he was trying to get away from Parkside Homes quickly, having dropped off a friend there, after he had seen several people in Parkside Homes firing guns.

{¶3} Officer Pasquel's inquiries revealed that Sheffield's driving privileges were suspended. He was arrested for DUS. A pat-down search of his person yielded a firearm identification card. Sheffield told Officer Pasquel that he had a gun under the driver's seat of his vehicle. A search yielded the gun.

{¶4} Sheffield was indicted for carrying concealed weapons in violation of R.C. 2923.12(A). Sheffield waived his right to a jury trial and the charge was tried to the court. Sheffield invoked the affirmative defense in R.C. 2923.12(C)(2). The trial court, relying on our decision in *State v. Hmidan* (May 7, 1999), Montgomery App. No. 17161, found Sheffield's evidence unpersuasive and rejected the affirmative defense. Sheffield was found guilty and was convicted. He was sentenced to five years of community control sanctions. He filed a timely notice of appeal.

ASSIGNMENT OF ERROR

{¶5} "THE TRIAL COURT ERRED BY RULING THAT DEFENDANT DID NOT PROVE THE AFFIRMATIVE DEFENSE TO THE CARRYING A CONCEALED WEAPON CHARGE."

{¶6} All crimes are statutory. Criminal liability requires (1) commission of a statutorily prohibited act or omission (2) with the degree of culpability the statute requires. R.C. 2901.21(A). It is the prosecution's burden to prove those elements of the offense beyond a reasonable doubt. R.C. 2901.05(A). However, "[t]he burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, is upon the accused." *Id*.

{¶7} An affirmative defense is one which, inter alia, is "expressly designated as affirmative." R.C. 2901.05(C)(1). Its proof by a preponderance of the evidence means that the greater weight or more convincing force of the evidence presented on the issue preponderates in favor of the defendant. *Merriman v. Hartfile* (1959), 112 Ohio App. 155. A positive finding relieves the defendant of criminal liability for the offense alleged.

{¶8} R.C. 2923.12(A) states: "No person shall knowingly carry or have, concealed on his or her person or concealed ready at hand, any deadly weapon or dangerous ordnance." It is undisputed that Sheffield violated that prohibition. At issue is the application of division (C) of R.C. 2923.12, which states:

{¶9} **"It is an affirmative defense to a charge under this section of carrying or having control of a weapon other than dangerous ordnance, that the actor was not otherwise prohibited by law from having the weapon, and that any of the following apply:**

{¶10} **"* * ***

{¶11} **"(2) The weapon was carried or kept ready at hand by the actor for defensive purposes, while the actor was engaged in a lawful activity and had reasonable cause to fear a criminal attack upon the actor or a member of the actor's family, or upon the actor's home, such as would justify a prudent person in going armed."**

{¶12} **In *Hmidan*, we held that the R.C. 2923.12(C)(2) affirmative defense "involves some particular danger or threat of criminal attack that is both specific and immediate, but no particular situation giving rise to the threat is required to create the defense." *Id.*, at p. 5. That latter qualification distinguishes the (C)(2) defense from the defense in (C)(1) of the section, which involves to the situational needs of the actor's employment.**

{¶13} **Sheffield explained that he had the gun in his car because, one week earlier, his niece had been driving the car in Parkside Homes when a random gunshot struck the car. He conceded that his niece had been caught in the crossfire between two groups firing guns and was not a target. He also conceded that the people he saw firing weapons on the**

night he was arrested were not firing at him.

{¶14} It is a bitter irony that in an advanced society people must live in fear of serious injury and death from random gunfire. However, that is a fact of life for people who are unfortunate enough to live in places where guns abound and are wantonly abused. Recently enacted "concealed carry" laws are predicated on the notion that having a gun and being trained in how to use it offers protection against threats of violence. Whether that will happen remains to be seen. However, one may exclude from whatever protections derive from that measure the form of violence involving random gunfire, which no measure or protection can prevent. Avoidance, if that's possible, is the only protection.

{¶15} Returning to the issue presented, and per *Hmidan*, the question is whether Sheffield showed that the criminal attack against which he carried the gun to protect himself was both specific and immediate. The trial court rejected the contention, finding that the events his niece had experienced one week before were too remote to be immediate, and that their random nature rendered the danger involved non-specific as to Sheffield. His contention on appeal is that the trial court's findings are against the manifest weight of the evidence.

{¶16} A weight of the evidence argument challenges the believability of the evidence, and asks which of the competing inferences suggested by the evidence is more believable or persuasive. *State v. Hufnagle* (Sept. 6,

1996), Montgomery App. No. 15562, unreported. The proper test to apply to that inquiry is the one set forth in *State v. Martin* (1983), 20 Ohio App.3d 172, 175:

{¶17} "[t]he court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." Accord: *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52.

{¶18} Sheffield was no better protected from the random gunshot violence his niece had experienced by driving through the area with a gun in his vehicle that had he driven through the area without a gun. Absent any showing that he or his vehicle were specific targets of some anticipated immediate act of violence, Sheffield did not satisfy the standard for the R.C. 2923.12(C)(2) affirmative defense that we articulated in *Hmidan*. The trial court did not err when it rejected Sheffield's affirmative defense as unproven.

{¶19} The assignment of error is overruled. The judgment of the trial court will be affirmed.

Judgment affirmed.

FAIN, P.J. and YOUNG, J., concur.

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