

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-08-1433

Appellee

Trial Court No. CR0200801599

v.

William Braylock

DECISION AND JUDGMENT

Appellant

Decided: September 30, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Mark T. Herr, Assistant Prosecuting Attorney, for appellee.

Deborah Kovac Rump, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} In this appeal from the Lucas County Court of Common Pleas, appellant, William Braylock, appeals his conviction on one count of voluntary manslaughter with a firearm specification, a violation of R.C. 2903.03 and 2941.145, a felony of the first degree. He asserts the following assignments of error:

{¶ 2} "Assignment of Error No. I: Braylock's conviction for voluntary manslaughter was against the manifest weight of the evidence because the record does not support the jury's finding that Braylock acted with 'knowingly' intent.

{¶ 3} "Assignment of Error No. II: The trial court abused its discretion by granting the state's motion in limine that excluded key incidents critical to Braylock's claim of self defense, and by allowing the state to make repeated references to an assault rifle that were highly prejudicial and not probative of any issue.

{¶ 4} "Assignment of Error No. III: Braylock met his burden to establish he was acting in self-defense. Further, his right to due process of law, equal protection, and to not be [sic] compelled to testify were violated by Ohio's self defense law.

{¶ 5} "Assignment of Error No. IV: There was insufficient evidence to support a conviction for voluntary manslaughter and the trial court should have granted his Rule 29 motion.

{¶ 6} "Assignment of Error No. V: The trial court abused its discretion by imposing such a lengthy sentence, particularly because it appears to be repudiated by the jury verdict on a lesser included offense.

{¶ 7} "Assignment of Error No. VI: The trial court abused its discretion by refusing to give an instruction for reckless homicide and by giving the jury an instruction regarding flight."

{¶ 8} Appellant, his sister, brother-in-law, niece, and nephew reside in appellant's house, which is located at 2510 Lawrence Avenue in Toledo, Lucas County, Ohio. A gang, known as the "Bloods," is active in this area. On February 21, 2008, four members

of the Bloods, including the decedent, Christopher Ross, invaded appellant's home in search of weapons. Two of the members, not Ross, engaged in a fight with appellant. The four then fled the home. After appellant and his family reported the incident to police officials, they received a number of threatening calls.

{¶ 9} On March 3, 2008, a group of Bloods gathered on a corner of Delaware and Lawrence near the home of Anthony Moore and his grandmother to mourn the death of Theodore Wiggins, a gang member who was killed on the previous evening. Christopher Ross, who was 17 years old at the time, was among that group. Appellant was seated on the porch of his home which is "cattycorner" to and on the other side of Lawrence from Moore's residence. According to Moore, William Braylock came down to the corner where the group was standing and instigated a fight between his nephew and Ross. After Moore spoke with him, appellant returned to his home. At some point after the first incident, Braylock came out of his house and stood on the porch holding a weapon that was described as a "long gun" or "big gun." He then went back into the house.

{¶ 10} Approximately two hours after the fight, Braylock again came out of his home wearing a "hoodie" jacket. According to Tyree Daniels, who was part of the group standing in front of Moore's home, appellant walked to the corner of Lawrence and Delaware, turned left on Delaware, and started heading toward Collingwood Avenue. He then stopped a "couple of feet from Lawrence and Delaware." Daniels was worried because appellant had his hand inside his jacket; therefore, he crossed the street and approached him. Tyree talked to Braylock and asked him to "not let nothing happen because we had just lost somebody and we ain't need no extra, extra garbage going

around." Anthony Moore also walked over and joined them. Appellant told them he did not want any "problem," but he was "going to protect his family." At that point, Daniels believed that everything was "copasetic."

{¶ 11} Appellant's niece, however, came out of the house with a baseball bat, stood next to her uncle, and began arguing with the crowd standing in front of Moore's house. Part of the crowd, which included Christopher Ross, started to "rush" across the street toward Daniels, Moore, Blaylock, and his niece. Blaylock pulled a handgun out of his jacket, and the crowd turned and started to run back across the street. Appellant fired the gun twice. The first bullet struck Christopher Ross in his left buttock as he was turning to run away. Ross fell in the street. When he got up, the second bullet struck him in the back, and he fell again. Ross was rushed to the hospital where he was pronounced dead. After the shooting, Braylock returned to his home, changed his clothing, and left, taking the .38 caliber handgun with him.

{¶ 12} At appellant's trial, the testimony of Cynthia Beisser, M.D., a forensic pathologist, revealed that after the first bullet entered through the decedent's left buttock, it passed through his thigh, severing the femoral vein. The second bullet entered the left side of Ross's back, then passed through and damaged a number of internal organs, including his spleen, before passing through his heart and aorta and lodging in the muscles on the right side of his chest. Dr. Beisser opined that both wounds were potentially fatal wounds.

{¶ 13} Based upon the foregoing, the jury found appellant guilty, and he was sentenced to nine years in prison for the violation of R.C. 2903.03, plus an additional mandatory and consecutive three years in prison on the firearm specification.

{¶ 14} We shall first address appellant's Assignment of Error No. II, which argues that the trial court abused its discretion in denying his motion in limine and granting appellee's motion in limine.

{¶ 15} A motion in limine is a request made prior to the presentation of certain evidence asking the court to limit or exclude that evidence because the movant believes it is inadmissible. *State v. Black*, 172 Ohio App.3d 716, 2007-Ohio-3133, ¶ 11. (Citation omitted.) "The motion asks the court to exclude the evidence unless and until the court is first shown that the material is relevant and proper." *Id.* at ¶ 11. A ruling on a motion in limine lies "within the sound discretion of the trial court" and shall not be overturned absent an abuse of that discretion. *State v. Werfel*, 11th Dist. Nos. 2002-L-101 and 2002-L-102, 2003-Ohio-6958, ¶ 64. An abuse of discretion connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 16} Prior to trial, the state filed a motion in limine asking the court to exclude any evidence of incidents that occurred *after* the shooting on March 3, 2008. These incidents included shots fired into appellant's residence, shots fired into a family member's residence, and an attempted arson at appellant's home. Appellant sought to have these incidents entered into evidence to show that it was his fear, when the decedent and other members of the crowd came across the street toward him, that caused him to

fire his handgun into the crowd. Initially, the trial court denied the state's motion noting, however, that it was just a preliminary ruling. It later granted that motion on the basis that this information was not relevant "on the issue of the state of the mind of the victim at the time of the shooting." We agree.

{¶ 17} Evid.R. 401 defines "relevant evidence" as that "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Here, appellant was permitted to offer evidence of the acts, e.g., the home invasion by members of the Bloods, that were relevant to his state of mind on March 3, 2008. What occurred after the shooting of Christopher Ross has no relevance to his state of mind on that particular date. Therefore, the trial court did not abuse its discretion in granting the state's motion in limine.

{¶ 18} Just prior to the beginning of his trial, appellant made a "preliminary motion in limine" to prevent a photograph of a gun from being entered into evidence. The gun, an AK-47, was discovered in appellant's home after the shooting. The state indicated that witnesses were going to testify that they saw appellant standing on the porch of his home with a "big gun"/"long gun" after the fight between Jeremy Howard and Christopher Ross on March 3, 2008. Presumably, this testimony was relevant to appellant's state of mind prior to the shooting of Christopher Ross. In any event, the court allowed the photograph into evidence without any further objection by appellant.

{¶ 19} A preliminary ruling on a motion in limine is "a tentative, interlocutory, precautionary ruling * * * [and] finality does not attach when the motion is granted."

State v. Grubb (1986), 28 Ohio St.3d 199. Thus, the initial ruling on a motion in limine does not preserve the record on appeal and an appellate court will not rule on the propriety of a motion in limine unless the introduction of the evidence is also made during trial and a final ruling is obtained. *Gable v. Vill. of Gates Mills*, 103 Ohio St.3d 449, 2004-Ohio-5719, ¶ 34. For this reason we will not address appellant's argument on the propriety of the introduction of the photograph into evidence. Appellant's Assignment of Error No. II is found not well-taken.

{¶ 20} Appellant's Assignment of Error III asserts that he met his burden establishing that he shot Christopher Ross in self defense. In the alternative, he claims that Ohio's "self defense law" violates his right to due process because it places the burden of proof on the defendant. He also argues that the statute is unconstitutional because it violates his right against self-incrimination in violation of the Fifth Amendment to the United States Constitution. We shall first consider appellant's constitutional arguments.

{¶ 21} R.C. 2901.05 provides, in relevant part:

{¶ 22} "(A) Every 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."

{¶ 23} The United States Supreme Court has already determined that Ohio's self defense statute does not violate due process by placing the burden of proof on the

defendant. See *Martin v. Ohio* (1987), 480 U.S. 228. We are bound to follow that law under the Supremacy Clause of the United States Constitution. *State v. Loyed*, 8th Dist. No. 83075, 2004-Ohio-3961, ¶ 33. Appellant also insists that in order to prove self defense under Ohio law, a criminal defendant is required to waive his Fifth Amendment rights and testify. Appellant failed to raise this issue in the trial court thereby waiving his right to raise it for the first time on appeal. *State v. Aswan* (1986), 22 Ohio St.3d 120, syllabus; *In re Goodman*, 161 Ohio App.3d 192, 2005-Ohio-2364, ¶ 26. Accordingly, we find appellant's constitutional arguments without merit.

{¶ 24} To establish self defense in a case where the defendant used deadly force, that defendant must prove the following elements by a preponderance of the evidence: (1) that he was not at fault in creating the situation giving rise to the altercation; (2) that he had a bona fide belief that he was in immediate danger of bodily harm and that his only means of escape from such danger was the use of deadly force; and (3) that he did not violate any duty to retreat or to avoid the danger. *State v. Barnes* (2002), 94 Ohio St.3d 21, 24, citing *State v. Robbins* (1979), 58 Ohio St.2d 74, paragraph two of the syllabus.

{¶ 25} As applied to the case before us, it is undisputed that appellant encouraged his nephew to fight with Christopher Ross, that he subsequently stood on his porch in view of the group of individuals in front of Moore's house with a "long gun," that approximately two hours after the fight, appellant, carrying a handgun, came and stood on the corner across from those individuals, that once he pulled the gun out of his jacket these individuals turned and headed back toward the Moore residence, and that

Christopher Ross was shot in the back and left buttock. Based upon these facts, appellant failed to demonstrate, by a preponderance of the evidence, any one of the elements of self defense. Therefore, Braylock's Assignment of Error III is found not well-taken.

{¶ 26} In his Assignment of Error No. I, appellant claims that his conviction on one count of involuntary manslaughter is against the manifest weight of the evidence because the prosecution failed to establish that he "knowingly" shot Christopher Ross.

{¶ 27} In deciding whether a conviction is against the manifest weight of the evidence, an appellate court's duty is to examine the entire record in order to determine whether the evidence offered at trial "attains the high degree of probative force and certainty required of a criminal conviction." *State v. Getsy*, 84 Ohio St.3d 180, 193, 1998-Ohio-533. The question is whether there is substantial evidence upon which a jury could reasonably conclude that all the elements of the charged offense have been proved beyond a reasonable doubt. *State v. Eley* (1978), 56 Ohio St.2d 169, syllabus. The reviewing court sits as a "thirteenth juror" and can, therefore, disagree "with the fact finder's resolution of the conflicting testimony." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, quoting *Tibbs v. Florida* (1982), 457 U.S. 31, 42. We can reverse the conviction if it appears that the fact finder, in resolving evidentiary conflicts, "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered ." Id. quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 28} Voluntary manslaughter occurs when a "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, * * * knowingly cause[s] the death of another * * * ." R.C. 2903.03(A). R.C. 2901.22(B) provides that "[a] person acts knowingly, regardless of purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶ 29} Here, the facts of the case reveal that appellant was angry with Christopher Ross and other members of the Bloods because of the home invasion, that he urged his nephew to engage in a fight with Ross earlier on the day of the shooting, that he subsequently appeared on his porch with a long gun, and that he deliberately walked to the corner of Lawrence and Delaware carrying a concealed handgun. Once a portion of the crowd, including Ross, started to come cross the street, he pulled out the handgun and shot twice into the fleeing individuals aware of the fact that he could probably kill someone, including Christopher Ross. Accordingly, appellant's conviction for involuntary manslaughter is not against the manifest weight of the evidence and his Assignment of Error No. I is found not well-taken.

{¶ 30} Appellant's Assignment of Error No. IV challenges the sufficiency of the evidence on the issue of whether the evidence supported a conviction for voluntary manslaughter and whether he acted "knowingly." A challenge to the sufficiency of the evidence supporting a conviction requires a court to determine whether the state has met its burden of production at trial. *Thompkins*, supra, at 387. In our review of the sufficiency of the evidence, we cannot assess the credibility of the state's evidence. *Id.*

The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. In viewing the evidence adduced at trial in a light most favorable to the state, we are compelled to conclude that the essential elements of voluntary manslaughter, as set forth above, were proven beyond a reasonable doubt. Appellant's Assignment of Error No. IV is not well-taken.

{¶ 31} Assignment of Error No. VI contends that the trial court abused its discretion by failing to instruct the jury on reckless homicide and by giving a flight instruction. The charged offense in this cause was murder in violation of R.C. 2903.02(B). Appellant also requested jury instructions on voluntary manslaughter, involuntary manslaughter, and reckless homicide. The trial court granted appellant's request with regard to the first two offenses, but found that reckless homicide is not a lesser included offense of murder.

{¶ 32} A criminal defendant is entitled to an instruction on a lesser included offense only if a trial court: (1) determines that the offense "is necessarily lesser than and included within the charged offense;" and (2) upon "examining the facts of the case, ascertains that the jury could reasonably conclude that the evidence supports a conviction for the lesser offense and not the greater." *State v. Johnson* (1988), 36 Ohio St.3d 224, 225. The court's decision as to whether to give an instruction on a lesser included offense is also reviewed under an abuse of discretion standard. *State v. Wolons* (1989), 44 Ohio St.3d 64, 68.

{¶ 33} Reckless homicide is a lesser included offense of both murder and felony murder. *State v. Alston*, 9th Dist. No. 05CA008769, 2006-Ohio-4152, ¶ 48. Nonetheless, even if a crime may constitute a lesser included offense, it does not follow that a lesser included offense instruction is mandatory; "[a]n instruction on a lesser included offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction on the lesser-included offense." *State v. Carter* (2000), 89 Ohio St.3d 593, 600. In determining whether the instruction was required, the reviewing court must view the evidence in a light most favorable to the defendant. *State v. Smith* (2000), 89 Ohio St.3d 323, 331.

{¶ 34} Here, the difference between murder and reckless homicide is the mens rea. R.C. 2903.02(A) defines "murder" as "purposely causing the death of another * * *." R.C. 2903.041(A) characterizes reckless homicide as "recklessly causing the death of another * * *." "Purposely" is defined in R.C. 2901.22(A), which reads, in pertinent part: "A person acts purposely when it is his specific intention to cause a certain result. * * *." An individual acts recklessly when, "with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature." R.C. 2901.22.

{¶ 35} To repeat, appellant first incited a physical fight between his nephew and Christopher Ross, who had previously invaded appellant's home. Appellant then intentionally placed a firearm in his jacket before positioning himself across the street from the group of individuals that included Christopher Ross. As the group of individuals came toward him, he pulled out the handgun. Then, despite the fact that the

group retreated, Braylock pointed the gun with the specific intention to shoot someone. The bullets from that gun hit Ross in the back and left buttock causing fatal injuries. Even in viewing this evidence in a light most favorable to appellant, we can conclude that his actions on March 3, 2008, were made with the specific intention to harm a member of the Bloods. Therefore, we cannot say that the trial court's decision not to give a jury instruction on reckless homicide was an abuse of discretion.

{¶ 36} Appellant also argues that the court below abused its discretion by providing the jury with an instruction on "flight." Appellant objected to the giving of such an instruction. The court overruled the objection stating, "The jury I think could reasonably find that this is a murder and that he fled. I'm going to charge on murder. So I think its [sic] reasonable." The trial judge then provided the following jury instruction related to appellant's argument:

{¶ 37} "Now, with regards to consciousness of guilt. Testimony has been admitted indicating that the defendant changed his appearance as he fled the scene. You're instructed that this conduct alone does not raise a presumption of guilt, but it may tend to indicate the defendant's consciousness of guilt. If you find that the facts do not support that the defendant changed his appearance or fled the scene, or if you find that some other motive prompted the defendant's conduct, or if you are unable to decide what the defendant's motivation was, then you should not consider this evidence for any purpose."

{¶ 38} In the present case, evidence, through the testimony of appellant's sister, was offered to show that appellant did change his clothing after the shooting and left the

area. Consequently, we cannot say that the trial court's decision to give the above jury instruction was arbitrary, unconscionable, or unreasonable.

{¶ 39} Assignment of Error No. VI is found not well-taken.

{¶ 40} In his Assignment of Error No. V, appellant complains that the court below abused its discretion in imposing such a lengthy sentence, particularly because the jury found appellant guilty of voluntary manslaughter rather than murder. In support of this assertion appellant refers to a number of "facts" that are not part of the record in this case. For example, he argues that despite the testimony of Dr. Beisser and the "state's own witnesses," the trial judge persisted in believing that Ross was shot in the back as he was running away. As set forth above, the testimony of all of the eyewitnesses and Dr. Beisser indicated that Ross was, indeed, turning and running away when he was shot. That said, we now turn to a consideration of the merits of appellant's assignment of error.

{¶ 41} In reviewing a felony sentence, we employ a two step analysis set forth by the Supreme Court of Ohio in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 26. Appellate courts are required to "examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law." *Id.* at 13. If this first prong is satisfied, the trial court's decision is reviewed under an abuse of discretion standard. *Id.*

{¶ 42} The applicable statutes to be applied by a trial court include the felony sentencing statutes R.C. 2929.11 and 2929.12, which are not fact-finding statutes, but rather "serve as an overarching guide for trial judges to consider in fashioning an appropriate sentence." *Id.* at ¶ 17. In addition, the sentencing court must be guided by

statutes that are specific to the case itself. *Id.* at ¶ 13, citing *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶ 38.

{¶ 43} R.C. 2929.11(A) states that:

{¶ 44} "[A] court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both."

{¶ 45} R.C. 2929.12 sets forth a nonexhaustive list of factors that the trial court is required to consider when determining whether the defendant's conduct is more or less serious than conduct normally constituting the offense.

{¶ 46} Appellant was convicted on one count of voluntary manslaughter in violation of R.C. 2903.03(A), with a firearm specification, a first degree felony. R.C. 2929.14(A)(1) provides the statutory range of sentences for first degree felonies of a minimum of three years and maximum of ten years. The trial court's imposition of a sentence of nine years is within the statutorily approved range of sentences. The imposition of a three year sentence on the firearm specification is mandatory.

{¶ 47} Moreover, the court considered the guidelines provided in R.C. 2929.11, 2929.12, as well as statutes which were specific to this case itself. *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶ 38. Therefore, the court's judgment was not contrary to

law. Finally, in considering the gravity of the shooting of a 17 year old who was not posing any threat to appellant, we cannot say that ordering the three year sentence imposed for the firearm specification to run consecutive to the nine year sentence imposed for the voluntary manslaughter conviction was unreasonable, arbitrary, or unconscionable. Thus, appellant's Assignment of Error No. V is found not well-taken.

{¶ 48} The judgment of the Lucas County Court of Common Pleas is affirmed.

Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24(A).

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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