

[Cite as *State v. Cruz-Altunar*, 2012-Ohio-4833.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 11AP-1114
v.	:	(C.P.C. No. 10CR-08-4512)
	:	
Jose Cruz-Altunar,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on October 18, 2012

Ron O'Brien, Prosecuting Attorney, and *Michael P. Walton*,
for appellee.

Robert D. Essex, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶ 1} Defendant-appellant, Jose Cruz-Altunar ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas, which convicted him of murdering Ricardo Perez. For the following reasons, we affirm.

I. BACKGROUND

{¶ 2} Appellant was indicted on one count of aggravated murder and two counts of murder for the death of Perez. Appellant pleaded not guilty to the charges, and a jury trial ensued. At trial, Adrian Worthington testified as follows. On July 24, 2010, appellant and Perez were arguing and trying to punch each other. The fight lasted for

three minutes until appellant walked away. Appellant returned three to five minutes later, and he approached Perez with a knife. Perez pulled a knife from his pocket, but Worthington took that knife in an attempt to thwart another fight. Nevertheless, appellant stabbed Perez. Perez fell to the ground and tried to defend himself by kicking appellant. Appellant stabbed Perez four more times and fled.

{¶ 3} Deputy Coroner Kenneth Gerston testified that Perez died from four of his stab wounds. Gerston said that the nature of those wounds indicates that Perez was lying down when he was fatally stabbed and that his assailant was above him. Gerston also noted that Perez had a "defensive wound" on his body. (Tr. 369.) Franklin County Sherriff Deputy John Robison testified that appellant was found hiding in a nearby bush after the stabbing. Detective William Duffer testified that appellant admitted to stabbing Perez.

{¶ 4} After the prosecution rested its case-in-chief, appellant testified as follows on his own behalf. On July 24, 2010, appellant was walking toward his apartment when Perez approached him. Perez wanted some beer that appellant was carrying. Appellant refused to give up his beer, and Perez and two other men attacked him. The fight ended and appellant went home. Appellant later went back outside with a knife, and he saw Perez again. Appellant waited by a dumpster to see what Perez was going to do. Perez approached him and threw him to the ground. Next, Perez pulled out a knife and tried to stab him. Appellant was afraid, and he stabbed Perez multiple times. Perez "loosened up and let go of his switchblade." (Tr. 425.) Appellant stabbed Perez another time and left.

{¶ 5} At the close of the evidence, appellant asked for jury instructions on self-defense and voluntary manslaughter. The trial court gave the self-defense instruction, but it declined to instruct on voluntary manslaughter. Afterward, the jury found appellant not guilty of aggravated murder and guilty of the two murder counts.

II. ASSIGNMENTS OF ERROR

{¶ 6} Appellant appeals and assigns the following as error:

[I.] The trial court erred in refusing to give an instruction on Voluntary Manslaughter when the evidence warranted such an instruction.

[II.] Appellant's convictions were not supported by sufficient evidence and were against the manifest weight of the evidence.

III. DISCUSSION

A. First Assignment of Error: Voluntary Manslaughter Instruction

{¶ 7} In his first assignment of error, appellant argues that the trial court erred by not giving a voluntary manslaughter instruction. We disagree.

{¶ 8} An abuse of discretion standard applies to the trial court's decision not to give a voluntary manslaughter instruction. *See State v. Holman*, 10th Dist. No. 02AP-1114, 2003-Ohio-3644, ¶ 15. An abuse of discretion connotes more than an error of law or judgment; it entails a decision that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). With this standard in mind, we consider the trial court's decision not to give a voluntary manslaughter instruction.

{¶ 9} R.C. 2903.03(A) defines voluntary manslaughter and states that "[n]o person, while under the influence of sudden passion or in a sudden fit of rage * * * shall knowingly cause the death of another." Appellant claims that he killed Perez because he was angry from their first fight. But appellant had sufficient time to calm down after that fight. In particular, appellant left the first fight and went home for a period of time. And, when he went back outside, he waited to see what Perez would do. Accordingly, appellant was not entitled to a voluntary manslaughter instruction given the opportunity he had to calm down after his first fight with Perez. *See State v. Collier*, 10th Dist. No. 09AP-182, 2010-Ohio-1819, ¶ 15. Furthermore, the trial court was not required to give the instruction because appellant testified that he stabbed Perez out of fear for his life rather than because of anger or rage. *See State v. Caldwell*, 10th Dist. No. 98AP-165 (Dec. 17, 1998).

{¶ 10} For all these reasons, we conclude that the trial court did not abuse its discretion by refusing to give a voluntary manslaughter instruction. We overrule appellant's first assignment of error.

B. Second Assignment of Error: Sufficiency and Manifest Weight of the Evidence

{¶ 11} In his second assignment of error, appellant argues that the jury's verdict is based on insufficient evidence and is against the manifest weight of the evidence. We disagree.

{¶ 12} The jury found appellant guilty of two counts of murder. Appellant initially argues that the verdict is based on insufficient evidence because he killed Perez in self-defense. But whether a defendant acted in self-defense is not an issue that this court addresses under a sufficiency of the evidence review. *State v. Morris*, 10th Dist. No. 05AP-1139, 2009-Ohio-2396, ¶ 25. Instead, this court considers self-defense under a manifest weight challenge. *State v. Hamilton*, 10th Dist. No. 11AP-981, 2012-Ohio-2995, ¶ 16. Consequently, appellant has not established that the jury's verdict is based on insufficient evidence, and we next address appellant's manifest weight claim.

{¶ 13} When presented with a manifest weight challenge, we weigh the evidence to determine whether 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. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, ¶ 220. The trier of fact is afforded great deference in our review. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶ 26. And we reverse a conviction on manifest weight grounds for only the most exceptional case in which the evidence weighs heavily against a conviction. *Lang* at ¶ 220.

{¶ 14} A defendant is not entitled to claim self-defense if he was at fault for creating the situation during which he used deadly force. *State v. Barnes*, 94 Ohio St.3d 21, 24 (2002). By appellant's own admission, he killed Perez during an incident that occurred after he re-emerged from his apartment with a deadly weapon. Therefore, the jury was able to conclude that appellant was at fault for setting up that incident. Likewise, the jury need not have accepted appellant's self-defense claim because he could have retreated during the fight, as he did during the first conflict with Perez, instead of allowing it to escalate. *See State v. Thomas*, 77 Ohio St.3d 323, 326 (1997).

{¶ 15} Furthermore, the jury was able to conclude that appellant lied when he testified that he killed Perez out of fear for his life. For instance, corroborating

testimony from Worthington and Gerston indicates that Perez was on the ground trying to defend himself when appellant leaned over him and fatally stabbed him. In addition, Worthington testified that Perez was unarmed during the conflict. To be sure, appellant testified that Perez had a knife. But appellant also admitted to stabbing Perez after he dropped the knife and was defenseless. Also, appellant demonstrated furtive conduct reflective of a consciousness of guilt when he fled and hid in the bushes after the stabbing. *See Hamilton* at ¶ 15. Lastly, appellant's self-defense claim is inconsistent with his voluntary manslaughter claim. *See Caldwell*.

{¶ 16} For all these reasons, appellant has not established that he killed Perez in self-defense. Therefore, the jury's verdict is not against the manifest weight of the evidence. Having also found no merit to appellant's sufficiency argument, we overrule his second assignment of error.

IV. CONCLUSION

{¶ 17} To conclude, we overrule appellant's two assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and SADLER, JJ., concur.
