[Cite as *State v. Mallory*, 2009-Ohio-2401.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 08AP-942 (C.P.C. No. 07CR-07-4778)
v.	:	(REGULAR CALENDAR)
Roland J. Mallory,	:	
Defendant-Appellant.	:	

O P I N I O N

Rendered on May 21, 2009

Ron O'Brien, Prosecuting Attorney, *Steven L. Taylor*, and *John H. Cousins, IV*, for appellee.

Clark Law Office, and *Toki Michelle Clark*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} This is an appeal by defendant-appellant, Roland J. Mallory, from a judgment of sentence and conviction entered by the Franklin County Court of Common Pleas, following a bench trial in which appellant was found guilty of voluntary manslaughter and felonious assault.

{¶2} On July 5, 2007, appellant was indicted on one count of murder, in violation of R.C. 2903.02, one count of attempted murder, in violation of R.C. 2923.02 and

2903.02, and two counts of felonious assault, in violation of R.C. 2903.11. Each of the counts carried a firearm specification. The indictment arose out of the shooting death of Gary Woods on June 23, 2007.

{¶3} Appellant waived his right to a jury trial, and the matter came before the court for a bench trial beginning August 4, 2008. The state presented the following evidence at trial. On June 23, 2007, Columbus police officers responded to a report of a shooting at 1297 East 26th Avenue. At the scene, one individual, Woods, was dead from gunshot wounds; another individual, Bridgette Baugh, had also been shot, and was transported to the hospital. Police officers found spent shell casings in the residence; the officers also noted a bullet strike that had passed through a couch and drywall, and officers found a spent projectile on the basement floor. No weapons were found at the scene.

{¶4} Shortly after the shooting, a police officer interviewed Baugh at the hospital. Baugh related that an individual known as "Ro-Ro" shot her and Woods. Columbus Police Detective Michael Friend took a photo array to the hospital and showed it to Baugh, who "immediately identified Roland Mallory as Ro-Ro." (Tr. Vol. I, 37.) Appellant was apprehended by police officers June 25, 2007.

{¶5} Baugh gave the following account of the events on June 23, 2007. On that date, she was at the home of Jerome Woods, on East 26th Avenue. Appellant, who was also at the residence, told Woods and Baugh he left $70 on a table, and that the money was now missing. Appellant went next door to make a phone call. When he returned, he had a black gun, which "looked like a 9-millimeter." (Tr. Vol. I, 131.)

{¶6} Baugh went outside briefly; when she came back inside, appellant and Woods were arguing, but they stopped arguing when they saw Baugh. Appellant was pacing around the living room, and said "[s]omebody is going to give me my mother-fucking money. I want my mother-fucking money." (Tr. Vol. I, 126.) He further stated that "[s]omebody was going to pay for his $70." (Tr. Vol. I, 130.) Woods asked appellant, "[w]hat are you going to do? You are going to shoot and kill us over $70 and go to jail for the rest of your life?" (Tr. Vol. I, 126.)

{¶7} At the time, Baugh began feeling uneasy, so she got up from the couch and stood near the door, while Woods sat on the couch. Appellant stated: "Ain't nobody leaving here until I get my money." (Tr. Vol. I, 130.) Baugh testified that "[w]e were all within inches of each other" when appellant "walked past me first, and he shot Jerome two times. Then he turned and looked me in my face and said, 'Fuck you' and shot me." (Tr. Vol. I, 127.) The bullet entered Baugh's back and exited the other side of her body.

{¶8} Despite being shot in the back, Baugh managed to run up the stairs. Woods got up and tried to go up the stairs too, but slumped down and fell at the bottom of the steps. Baugh heard Woods "take his last breaths." (Tr. Vol. I, 127.)

{¶9} Anthony Martin, who dated Baugh, was at 1297 East 26th Avenue on the evening of June 23, 2007. Martin was in the backyard when he heard four gunshots from inside the residence. Martin testified that appellant came out of the back door, pointed a gun at him and tried to shoot, but the weapon jammed. Appellant then took off running down an alley. Martin heard his girlfriend Baugh screaming, so he ran into the house. He observed Woods lying on his back with gunshot wounds to his chest. Woods "was gurgling like he was taking his last breath." (Tr. Vol. I, 75.) Martin ran upstairs to assist

Baugh. Martin dialed 911, but he left the house before police officers arrived because he had outstanding warrants for his arrest.

{¶10} Appellant testified on his own behalf. Appellant, age 22, admitted to selling drugs for a living. He had known Woods for approximately six months prior to the incident. Appellant and Woods had entered into an arrangement whereby appellant sold drugs from Woods' apartment; in return, appellant would pay Woods $40 per day to use the apartment.

{¶11} According to Baugh, Woods and Martin (nicknamed "Black") were smoking crack cocaine. Earlier in the day, appellant and Woods got into an argument after appellant informed Woods this would be his last day selling drugs at the residence. Woods thought appellant "was opening another crack house somewhere else." (Tr. Vol. II, 222.) Woods told appellant to "pay your last day taxes, meaning that I owed him 80, or I got to give him more than 40, and I was like, no, I ain't like about to give you that." (Tr. Vol. II, 222.)

{¶12} At one point during the argument, Baugh entered the apartment, at which time the two men stopped arguing. Appellant testified that, when he got up to let Baugh inside, Woods went upstairs. When Woods came downstairs, Woods "had his hand on the side of the couch." (Tr. Vol. II, 223.) Woods kept asking appellant for money.

{¶13} Baugh got up and walked to the door, and Woods told Baugh, "[y]ou ain't got to go nowhere." (Tr. Vol. II, 224.) Appellant then gave the following account of the events:

> Jerome, he – he reached – he reached – Jerome keeped – Jerome keep the gun up under the couch, in between the cushions, or he keep it in his pocket, the .32 revolver that we

> had got from Black that day, and Jerome reached, and I shot him in the shoulder, and she screamed, and I – and the gun went off again, and Bridgette ran behind me, and the gun went off again, and I wasn't trying to – I wasn't trying to hit her. You know what I'm saying?
>
> The gun went off, though, and I dropped the gun, and I ran out the back door. And I didn't see Black in the alley next door. I didn't see – I didn't see Black. I didn't see Black nowhere around there.

(Tr. Vol. I, 224-25.)

{¶14} According to appellant, after he shot Woods in the shoulder "it scared me, and I jumped and the gun went off." (Tr. Vol. II, 225.) Appellant stated that Baugh stumbled and pushed him, and "like the gun had went off again." (Tr. Vol. II, 225.) Appellant testified that he was unaware Baugh had been shot until police officers later informed him that Woods was dead.

{¶15} Appellant stated there were 25 bullets in the automatic weapon, "so like if you * * * squeeze the trigger, like you can unload the whole clip." (Tr. Vol. II, 226.) Appellant testified that he "tried to shoot him [Woods] once in the shoulder. I did shoot him once in the shoulder, but I know the gun went off again, and I don't know where it hit him at." (Tr. Vol. II, 226.) Appellant shot Woods because he was reaching up under the couch "where he keep that gun at." (Tr. Vol. II, 227.) Appellant denied intentionally shooting Baugh, stating "if I really wanted to kill her, I could have shot her in the head." (Tr. Vol. II, 227.) Appellant stated that he dropped the weapon in the front room after the shooting.

{¶16} On cross-examination, appellant explained that he carried a .9mm weapon because "somebody done tried to rob me because I sell dope." (Tr. Vol. II, 240.)

Appellant testified that he shot Woods because he "didn't know what he [Woods] was reaching for." (Tr. Vol. II, 255.) Appellant "didn't actually see" a gun, but he knew Woods kept a weapon "in that vicinity." (Tr. Vol. II, 255.)

{¶17} Following the presentation of evidence, the trial court rendered a verdict finding appellant not guilty of murder, but guilty of voluntary manslaughter, pursuant to R.C. 2903.03, with specification. The court also found appellant guilty of both counts of felonious assault, and the accompanying specifications, but not guilty of attempted murder. The trial court filed a sentencing entry September 26, 2008.

{¶18} On appeal, appellant sets forth the following three assignments of error for this court's review:

> ASSIGNMENT OF ERROR NO. 1:
>
> A TRIAL COURT COMMITS ERROR WHEN IT FAILS TO CONSIDER THE DEFENSE OF ACCIDENT WHERE A CRIMINAL DEFENDANT IN A FELONIOUS ASSAULT BENCH TRIAL TESTIFIES HE WAS NOT EVEN AWARE OF A VICTIM BEING SHOT.
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> ASSIGNMENT OF ERROR NO. 2:
>
> A TRIAL COURT COMMITS ERROR WHEN IT FAILS TO CONSIDER SELF-DEFENSE WHERE A CRIMINAL DEFENDANT IN A BENCH TRIAL TESTIFIES HE OBSERVED THE VICTIM REACHING FOR A GUN.
>
> ASSIGNMENT OF ERROR NO. 3:
>
> THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE DEFENDANT WHEN THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONVICTION AND WAS NOT SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶19} Appellant's assignments of error are interrelated and will be considered together. Under these assignments of error, appellant challenges his convictions as not supported by sufficient evidence and as against the manifest weight of the evidence. He also asserts that the trial court erred in failing to consider the defenses of accident and self-defense.

{¶20} In cases involving a bench trial, "the trial court assumes the fact-finding function of the jury." *Cleveland v. Welms,* 169 Ohio App.3d 600, 2006-Ohio-6441, ¶16. A challenge to the sufficiency of the evidence "invokes a due process concern and raises the question of whether the evidence is legally sufficient to support the jury verdict as a matter of law." *State v. Scott,* 101 Ohio St.3d 31, 2004-Ohio-10, ¶31, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. In considering "such a challenge, '[t]he 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.' " *Scott,* at ¶31, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶21} In order to warrant reversal from a bench trial under a manifest weight of the evidence claim, a reviewing court must "review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether in resolving conflicts in evidence, the trial court clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered." *Welms,* at ¶16, citing *Thompkins*, at 387.

{¶22} R.C. 2903.03(A) sets forth the offense of voluntary manslaughter, and provides in relevant part: "No 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, shall knowingly cause the death of another." R.C. 2903.11(A)(2) defines the offense of felonious assault, and states in part: "No person shall knowingly * * * [c]ause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance." A person acts "knowingly" when, "regardless of his purpose, * * * 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." R.C. 2901.22(B).

{¶23} In considering appellant's sufficiency challenge, the state presented evidence which, if believed, showed that appellant, who sold drugs at Woods' residence, became angry because some money was missing. Appellant began arguing with Woods, demanding the return of his money, and threatening that "somebody was going to pay" for the $70. When Woods inquired as to what appellant was "going to do" about the missing money, appellant pulled out a gun and shot Woods three times. After shooting Woods, appellant turned to Baugh, said "Fuck you," and then shot her in the back. Appellant exited the back door of the residence, at which time he encountered Martin. Appellant pointed the gun at Martin, but the weapon jammed. Appellant then took off running down an alley.

{¶24} The coroner's report, admitted at trial as State's Exhibit No. 29, contained the autopsy results as reported by Dr. Bradley J. Lewis. The autopsy report indicated that Woods suffered three gunshot wounds; one of the gunshot wounds entered the victim's left chest, and perforated his heart, while another gunshot wound also struck the victim's

left chest, perforating his left lung. The victim also suffered a gunshot wound to the left upper arm.

{¶25} Upon review, the evidence presented by the state surrounding the shooting, including the testimony of Baugh that appellant voluntarily fired shots at her and Woods, as well as evidence as to the location of the wounds and the number of shots fired, was sufficient for the trial court to conclude that appellant acted knowingly. Here, construing the evidence most strongly in favor of the prosecution, as we are required to do, the state presented sufficient evidence to support the elements of felonious assault and voluntary manslaughter.

{¶26} We next address appellant's contentions that the trial court erred in failing to consider a claimed defense of accident, as well as the theory of self-defense. Ohio law provides "certain 'justification[s] for admitted conduct' allowed to a defendant in a criminal case, provable for the most part under the plea of not guilty, which are referred to as 'affirmative defenses.' " (Bracketed material sic.) *State v. Poole* (1973), 33 Ohio St.2d 18, 19. Affirmative defenses do not represent a mere denial or contradiction of evidence that the prosecution has offered as proof of an essential element of the crime charged; "rather, they represent a substantive or independent matter 'which the defendant claims exempts him from liability even if it is conceded that the facts claimed by the prosecution are true.' " Id. Among the affirmative defenses, under Ohio law, are "self-defense, duress, insanity, and intoxication," and such defenses "must be proved by a preponderance of the evidence." (Footnotes omitted.) Id.

{¶27} Under Ohio law, "[s]elf-defense is an affirmative defense that excuses or justifies a use of force which would otherwise result in a criminal conviction." *State v.*

Tirabassi, 8th Dist. No. 85236, 2005-Ohio-3439, ¶29. In order to establish self-defense, a defendant is required to show, by a preponderance of the evidence, that "(1) he was not at fault in creating the situation giving rise to the affray; (2) he had a bona fide belief that he was in imminent danger of bodily harm; and (3) he did not violate any duty to retreat or avoid the danger." *State v. Johnson,* 11th Dist. No. 2005-L-103, 2006-Ohio-2380, ¶19, citing *State v. Melchior* (1978), 56 Ohio St.2d 15, 20-21.

{¶28} Accident, however, "is not an affirmative defense in this state." *Poole,* at 20. In "raising the defense of accident, 'the defendant denies any intent. He denies that he committed an unlawful act and says that the result is accidental.' " Id. See also *State v. Atterberry* (1997), 119 Ohio App.3d 443, 447 ("[a]ccident is an argument that supports a conclusion that the state has failed to prove the intent element of the crime beyond a reasonable doubt").

{¶29} In arguing that the trial court erred in failing to consider the defense of accident, appellant asserts that the shooting of Baugh was unintended and not the result of a voluntary act. Appellant maintains Baugh was shot accidentally in the back, and that he was not even aware she had been shot until he later spoke with police officers.

{¶30} We note that appellant's trial counsel did not raise a theory of accident during the trial of this matter. As such, appellant has waived all but plain error. Crim.R. 52(B) states: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Plain error does not exist unless, "but for the error, the outcome of the trial clearly would have been otherwise." *State v. Long* (1978), 53 Ohio St.2d 91, 97. Further, as noted, appellant waived a jury trial, and "[u]nlike a jury, which must be instructed on the applicable law, a trial judge is presumed to know

the applicable law and apply it accordingly." *State v. Waters,* 8th Dist. No. 87431, 2006-Ohio-4895, ¶11. In a bench trial, "the law presumes that * * * the court considers only relevant, material, and competent evidence." *State v. Bays*, 87 Ohio St.3d 15, 27, 1999-Ohio-216.

{¶31} In the present case, the trial court heard conflicting evidence as to appellant's intent in firing the weapon, which resulted in the death of Woods and in Baugh being shot in the back. While appellant admitted he attempted to shoot Woods in the shoulder, he testified that, after that initial shot, the gun just "went off again." Baugh, however, testified that appellant, who was angry at Woods over missing money, fired several shots at Woods, who was sitting on the couch, and then "turned and looked me in my face and said, 'Fuck you' and shot me." As noted above, two of the three wounds to Woods entered his chest area, striking vital organs.

{¶32} Here, based upon the evidence presented, the trier of fact could have reasonably found appellant's version of the events to be incredible, and the court was free to reject appellant's account and accept Baugh's testimony. Further, assuming the defense of accident was viable under the facts, it is presumed in a bench trial, unless the record affirmatively appears to the contrary, that the court considered the appropriate defenses. *State v. Perez,* 8th Dist. No. 91227, 2009-Ohio-959, ¶61.

{¶33} As to the issue of self-defense, there is nothing in the record to indicate that the trial court failed to consider appellant's self-defense theory. As noted by the state, defense counsel raised the theory of self-defense during closing argument and, as stated above, there is a presumption that the court considered appropriate defenses.

{¶34} We have also noted above the conflicting testimony between the accounts given by Baugh and appellant, and there was evidence presented which, if believed, indicated that appellant was the first aggressor. Specifically, Baugh testified that, following the initial argument with Woods, appellant left the house for a brief period of time and returned with a weapon. Appellant then told Baugh and Woods that "[s]omebody is going to give me my mother-fucking money. I want my mother-fucking money." When Woods asked appellant what he was going to do about the missing money, appellant pulled out his weapon and shot Woods multiple times.

{¶35} The trier of fact could have further found that appellant lacked a bona fide belief he was in imminent danger. While appellant testified that he saw Woods reach for something, appellant "didn't know what he reached for." As noted under the facts, police officers did not recover any weapons at the scene. Further, given the number of shots fired, the location of the wounds to vital organs of the decedent, and the fact that Baugh, an eyewitness to the shooting of Woods, was also shot by appellant, the trial court could have found less than credible appellant's claim that he only aimed the weapon once at Woods' shoulder, and that the other rounds just "went off." Rather, under the facts presented, the trier of fact could have reasonably concluded that appellant did not act in self-defense.

{¶36} Finally, appellant contends that his convictions were against the manifest weight of the evidence because appellant accidentally shot Woods, and because there was evidence to support a theory that Martin retrieved all of the weapons from the scene and disposed of them before police officers arrived. As to appellant's claim that he accidentally shot Woods, we have previously addressed the conflicting accounts of the

shooting. The credibility of witnesses and the weight to be afforded their testimony are primarily matters for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The trial court, as trier of fact, was free to believe or disbelieve appellant's account, and the court obviously found appellant's version less than credible. Regarding purported actions of Martin in retrieving weapons, the state presented testimony by Martin that he observed appellant exit the house with a weapon in his hand. While appellant claimed he dropped the weapon in the residence after the shootings, the trier of fact was free to disbelieve appellant's version of the incident.

{¶37} Upon review of the record, we are unable to conclude that the trial court lost its way and created a miscarriage of justice warranting a new trial. We therefore find no merit to appellant's argument that his convictions are against the manifest weight of the evidence.

{¶38} Based upon the foregoing, appellant's first, second, and third assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

BRYANT and SADLER, JJ., concur.

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