

[Cite as *State v. Bush*, 2010-Ohio-2874.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-090291
Plaintiff-Appellee,	:	TRIAL NO. B-0805752
vs.	:	<i>DECISION.</i>
WILLIAM BUSH,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed and Cause Remanded

Date of Judgment Entry on Appeal: June 25, 2010

Joseph T. Deters, Prosecuting Attorney, and *Philip R. Cummings*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Christine Y. Jones, for Defendant-Appellant.

Please note: This case has been removed from the accelerated calendar.

WILLIAM L. MALLORY JR., Judge.

{¶1} Defendant-appellant William Bush appeals from his murder conviction. He challenges on appeal the overruling of his motion to suppress, the trial court's refusal to instruct the jury on self-defense, alleged instances of prosecutorial misconduct, and the weight and sufficiency of the evidence to support his conviction. Finding no merit to any of these challenges, we affirm his conviction.

I. Statement of Facts and Procedural Posture

{¶2} On May 30, 2008, Charles Lunsford and Robert Walls drove to downtown Cincinnati for the purpose of purchasing illegal drugs. Upon arrival, Walls left the car and eventually discovered an individual who would sell the drugs Walls desired. Before the transaction was completed, an apparent dispute arose between Walls and his seller. This dispute culminated with Walls stabbing Bush in the shoulder. Allegedly, Bush, and possibly others, chased Walls back to the car where Lunsford was waiting. Walls made it back to the car, but not before suffering a fatal gunshot wound to the face. Walls died in the car as he and Lunsford made their unsuccessful escape.

{¶3} Bush was eventually apprehended and arrested. He was indicted on one count of murder with firearm specifications. Prior to trial, Bush filed a motion to suppress statements made while in police custody. Bush had admitted shooting Walls, but claimed that the shooting was accidental. Bush's motion was overruled by the trial court, and the recorded statements made in police custody eventually were entered into evidence.

{¶4} At the close of the prosecution's case, Bush made a Crim.R. 29 motion for an acquittal, which the trial court overruled. The trial court also declined to

include a jury instruction on the affirmative defense of self-defense as requested by Bush. The trial court did, however, instruct the jury that if it could not find Bush guilty of murder, that it could consider the lesser offense of voluntary manslaughter. The jury found Bush guilty of murder and the one firearm specification. The trial court sentenced Bush to a prison term of 18 years to life. In this appeal Bush now asserts six assignments of error.

II. Motion to Suppress

{¶5} We address first Bush’s fourth assignment of error, in which he challenges the overruling of his motion to suppress statements he had made while in police custody. Bush argues that the statements should have been suppressed because he was denied the assistance of counsel despite asking for a lawyer on numerous occasions throughout the police interview. Bush also claims that he was intoxicated at the time of the interview, and therefore that he was incapable of giving a knowing and voluntary waiver of his rights. Finally, Bush argues that even though he had signed a police-supplied “notification of rights” form, the police did not orally ask if he understood his rights.

{¶6} Appellate review of a ruling on a motion to suppress presents a mixed question of law and fact.¹ When considering a motion to suppress, the trial court assumes the role of the trier of fact.² An appellate court must accept the trial court’s findings of fact if they are supported by competent, credible evidence.³

{¶7} Ordinarily, when a suspect in police custody invokes his Fifth Amendment right to counsel, police interviewers must cease the interrogation and

¹ *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶8.

² *Id.*

³ *Id.*, citing *State v. Fanning* (1982), 1 Ohio St.3d 19, 437 N.E.2d 583.

may not further initiate the interview until the suspect's lawyer is present.⁴ However, "the suspect must unambiguously request counsel. * * * [H]e must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney."⁵ If the suspect's request for the assistance of counsel "fails to meet the requisite level of clarity," the police are not required to stop the interrogation.⁶

{¶8} Although the police must cease an interview if the suspect requests the assistance of counsel, the suspect himself may initiate further communication and conversation with the police.⁷ The suspect himself must initiate the dialogue with the police and must knowingly and voluntarily waive his right to counsel.⁸

{¶9} After a thorough review of the record, we hold that Bush was properly advised of his *Miranda* rights and that he knowingly and voluntarily waived those rights prior to his interview with police. Before the interview began, Bush was given a "Notification of Rights" form that detailed in writing his *Miranda* rights. Bush signed the form prior to the interview. In addition, testimony revealed that the police did not smell alcohol on his person, and the recorded interview reveals that Bush coherently answered the questions posed to him, and that he did not sound intoxicated during the interview.

{¶10} We further hold that the police did not improperly continue the interrogation despite Bush's repeated requests for counsel. Even though Bush requested the assistance of counsel several times during the interview, each time he further initiated the interrogation by continuously speaking to the interrogators, or

⁴ *Miranda v. Arizona* (1966), 384 U.S. 436, 474, 86 S.Ct. 1602.

⁵ *Davis v. United States* (1994), 512 U.S. 452, 459, 114 S.Ct. 2350.

⁶ *Id.*

⁷ *Edwards v. Arizona* (1981), 451 U.S. 477, 484-485, 101 S.Ct. 1880.

⁸ *Oregon v. Bradshaw* (1983), 462 U.S. 1039, 1045-1046, 103 S.Ct. 2830.

by conditioning his request for counsel. On at least two occasions, the police attempted to stop the interview with Bush, only to have Bush interrupt them by asking questions of his own regarding the investigation.

{¶11} Because Bush knowingly and voluntarily waived his *Miranda* rights, and because each time Bush requested the assistance of counsel, he soon after reinitiated the interrogation, the trial court did not commit reversible error when it overruled Bush's motion to suppress. We, therefore, overrule Bush's fourth assignment of error.

III. Self-Defense Instruction

{¶12} In his fifth assignment of error, Bush argues that the trial court erred when it did not instruct the jury on the affirmative defense of self-defense. Bush asserts that a defendant does not need to testify about his knowledge concerning a danger or the need for the use of force if the defendant otherwise presents evidence supporting the elements of the defense.⁹ Bush further argues that he, in fact, did present adequate evidence to support the elements of self-defense.

{¶13} We hold that the trial court did not commit reversible error when it overruled Bush's request for a jury instruction on self-defense. Generally, "a trial court must give the defendant's requested instructions to the jury if they are correct, pertinent statements of law and are appropriate under the facts of the case."¹⁰ In situations where a defendant requests a jury instruction on self-defense, the defendant must have demonstrated by a preponderance of the evidence at trial (1) that the defendant had not been at fault in creating the situation; (2) that he had a bona fide belief that he was in imminent danger; and (3) that he had not violated a

⁹ *State v. Harris* (1998), 129 Ohio App.3d 527, 538, 718 N.E.2d 488.

¹⁰ *State v. Brewster*, 2004-Ohio-2993, at ¶58.

duty to retreat.¹¹ A trial court's decision on requested jury instructions is reviewed under an abuse-of-discretion standard.¹²

{¶14} A review of the record reveals that, during his interrogation with police, Bush claimed that the shooting had been accidental. Simple logic would dictate that a person cannot "accidentally" shoot someone in self-defense. A shooting in self-defense is purposeful, yet also justifiable. In addition, eyewitness testimony from the scene of the shooting indicated that Bush had stated, "I'm going to kill this motherfucker!", referring to Walls. Another witness testified that Bush had admitted shooting Walls because Walls had stabbed him. Two other witnesses testified to seeing Bush chase Walls back to his car and shoot Walls multiple times.

{¶15} Based on this evidence, we hold that Bush did not demonstrate by a preponderance of the evidence that he was entitled to a jury instruction on self-defense, and we further hold that the trial court did not abuse its discretion when it denied Bush's request for that instruction. Bush's fifth assignment of error is overruled.

IV. Prosecutorial Misconduct

{¶16} In his sixth assignment of error, Bush asserts that the prosecution engaged in misconduct in its closing statement when the assistant prosecuting attorney made the following comment: "The defendant himself never even told you." Bush argues that this remark constituted a comment on his failure to take the stand and violated his constitutional privilege against self-incrimination, and that he is accordingly entitled to a new trial.

¹¹ *State v. Robbins* (1979), 58 Ohio St.2d 74, 388 N.E.2d 755, paragraph two of the syllabus.

¹² See, generally, *State v. Wolons* (1989), 44 Ohio St.3d 64, 68, 541 N.E.2d 443.

{¶17} “The test regarding prosecutorial misconduct in closing arguments is whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the defendant.”¹³ Further, “it is not enough that there be sufficient other evidence to sustain a conviction in order to excuse the prosecution’s improper remarks. Instead, it must be clear beyond a reasonable doubt that, absent the prosecutor’s comments, the jury would have found defendant guilty.”¹⁴ The state notes in this case that Bush never objected to the prosecutor’s remark at trial, and thus that the remark must be reviewed for plain error only. Alternatively, the state argues that even if the remark was improper, it was a harmless error that did not require a new trial.

{¶18} It is well established that it is improper for a prosecutor to comment on a defendant’s failure to testify.¹⁵ In this case, however, a further examination of the prosecutor’s remark puts it into a much clearer context. From the transcript it is evident that the assistant prosecuting attorney was not commenting on Bush’s decision not to testify at trial. Rather, she was commenting on Bush’s original statement to investigators. As we have previously discussed, Bush stated to investigators that the shooting had been accidental. But during trial, he attempted to demonstrate that he had shot the victim in self-defense or in a fit of rage. The comment thus concerned Bush’s changing explanations for the cause of the shooting. We hold that the comment, when put into its appropriate context, did not give rise to plain error. Accordingly, Bush’s sixth assignment of error is overruled.

¹³ *State v. Smith* (1984), 14 Ohio St.3d 13, 14, 470 N.E.2d 883, citing *United States v. Dorr* (C.A. 5, 1981), 636 F.2d 117, 120.

¹⁴ *Id.* at 15, citing *United States v. Hastings* (1983), 461 U.S. 499, 510, 103 S.Ct. 1974.

¹⁵ *State v. Fears*, 86 Ohio St.3d 329, 336, 1999-Ohio-111, 715 N.E.2d 136, citing *Griffin v. California* (1965), 380 U.S. 609, 614, 85 S.Ct. 1229.

V. Sufficiency and Weight of the Evidence

{¶19} In his first assignment of error, Bush argues that his conviction was not supported by sufficient evidence, and in his third assignment of error, Bush asserts that the trial court erred when it overruled his Crim.R. 29 motion for an acquittal. Finally, in his second assignment of error, Bush argues that his conviction was contrary to the manifest weight of the evidence. We examine all three assignments of error together.

{¶20} “The test [for the sufficiency of the evidence] is whether after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt.”¹⁶ A defendant’s Crim.R. 29 motion is held to the same test.¹⁷ But even if a reviewing court determines that a conviction is sustained by sufficient evidence, the judgment may still be against the manifest weight of the evidence. When examining a challenge to the manifest weight of the evidence, a reviewing court “review[s] 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 [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.”¹⁸

{¶21} R.C. 2903.02(A) establishes the elements that must be proved to support a conviction for murder. It provides, “No person shall purposely cause the death of another[.]” As we have already noted, Bush admitted shooting Walls not

¹⁶ *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

¹⁷ *State v. Williams*, 74 Ohio St.3d 569, 576, 1996-Ohio-91, 660 N.E.2d 724.

¹⁸ *State v. Thompkins* (1977), 78 Ohio St.3d 380, 387, 678 N.E.2d 541, quoting *Martin*, 20 Ohio App.3d at 175.

only to police, but also to another witness who testified at trial. In addition, one witness testified that he had heard Bush exclaim that he was “going to kill” Walls. Two other witnesses testified that they had seen Bush chase Walls and eventually shoot him multiple times. Taken together, this evidence was sufficient to prove that Bush had purposefully caused the death of Walls. We hereby overrule Bush’s first and third assignments of error.

{¶22} In his argument regarding the manifest weight of the evidence, Bush contends that the testimony and evidence did not support his conviction and that the jury clearly “lost its way” when it found him guilty. But the jury heard all the testimony and reviewed all the evidence, and it rejected Bush’s theories that the shooting had been accidental, had been provoked by Walls himself, or was in self-defense. In the event that it could not find Bush guilty of murder, the jury was instructed to consider the lesser offense of voluntary manslaughter. The jury rejected that theory and determined that Bush had purposefully caused Walls’s death. The weight to be given the evidence and the credibility of the witnesses were primarily for the trier of fact.¹⁹ Considering all the evidence and the testimony previously recited, we cannot say that Bush’s conviction was against the manifest weight of the evidence. We, therefore, overrule his second assignment of error.

VI. Costs of Prosecution

{¶23} We note from the trial transcript that the trial court, during Bush’s sentencing, verbally imposed the costs of the prosecution on Bush. However, the trial court failed to journalize its assessment of costs in the judgment entry. We must remand the case so that the court’s judgment may be modified accordingly.²⁰

¹⁹ *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus.

²⁰ See *State v. Lukacs*, 1st Dist. Nos. C-090309 and C-090310, 2010-Ohio-2364; *State v. Harmon*, 6th Dist. No. L-05-1078, 2006-Ohio-4642.

VII. Conclusion

{¶24} Therefore, we remand the case to the trial court for the imposition of mandatory costs under R.C. 2947.23. But we find no merit to any of Bush's six assignments of error, so we otherwise affirm judgment of the trial court.

Judgment affirmed and cause remanded.

CUNNINGHAM, P.J., and HILDEBRANDT, J., concur.

Please Note:

The court has recorded its own entry this date.