

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

STATE OF OHIO,	:	APPEAL NO. C-120187
Plaintiff-Appellee,	:	TRIAL NO. B-1107277
vs.	:	
JOHN BRANHAM,	:	<i>JUDGMENT ENTRY.</i>
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant John Branham was found guilty, after a bench trial, of trafficking in drugs, a fifth-degree felony, and discharge of a firearm on or near a prohibited premises, a third-degree felony. Branham was sentenced to a total of thirty-six months in prison, with credit for time served. He appeals from his discharge-of-a-firearm conviction, raising four assignments of error.

Branham argues in his first assignment of error that the trial court erred by finding him guilty of the firearm offense when he had acted in self defense. To prove the affirmative defense of self defense, a defendant must show

- (1) that the defendant was not at fault in creating the situation giving rise to the affray; (2) that the defendant had a bona fide belief that he was in imminent danger of

death or great bodily harm and that his only means of escape from such danger was in the use of such force; and (3) that the defendant did not violate any duty to retreat or avoid the danger.

State v. Barnes, 94 Ohio St.3d 21, 24, 759 N.E.2d 1240 (2002), citing *State v. Robbins*, 58 Ohio St.2d 74, 388 N.E.2d 755 (1979), paragraph two of the syllabus. Each element must be proven by a preponderance of the evidence. *State v. Jackson*, 22 Ohio St.3d 281, 284, 490 N.E.2d 893 (1986).

Branham failed to prove the first element—that he was not at fault in creating the situation—by a preponderance of the evidence. The testimony adduced at trial showed that Branham had gone to a particular area on McPherson Avenue in Price Hill looking for the person who previously had shot him. Branham testified that he had gone to this area specifically “to holler at this man.” Branham also had brought a loaded gun with him. While standing outside of a friend’s house on McPherson, Branham’s friend said to Branham, “That’s him.” A gun battle ensued. This evidence contradicts Branham’s claim that he had not been at fault for causing the situation that had led him to discharge his firearm—even if he had not fired the first shot. Therefore, his first assignment of error is overruled.

In Branham’s second assignment of error, he argues that he had fired his weapon out of necessity, and, therefore, the trial court erred in finding him guilty of the firearm offense. Branham failed to raise this argument to the trial court, so he has waived all except plain error on appeal. *State v. Wickline*, 50 Ohio St.3d 114, 552 N.E.2d 913 (1990); Crim.R. 52(B). As pointed out by the state, necessity applies to external, nonhuman force; therefore, Branham’s argument that he had been forced

to return gunfire raises the defense of duress. *See State v. Lawson*, 2d Dist. No. 22155, 2008-Ohio-1311, ¶ 21. The defense of duress, however, just as self defense, requires the actor to have been without fault in creating the situation. *State v. Flinders*, 9th Dist. No. 26024, 2012-Ohio-2882, ¶ 30. As we have already noted, Branham was not without fault in creating the gun battle. Therefore, his defense of duress is without merit, and the second assignment of error is overruled.

In his third and fourth assignments of error, Branham argues that his firearm conviction was supported by insufficient evidence and was against the manifest weight of the evidence. After reviewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found the essential elements of discharge of a firearm proven beyond a reasonable doubt. *See State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. Furthermore, we cannot say that the trier of fact clearly lost its way and created a manifest miscarriage of justice in finding Branham guilty. *See State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). Therefore, Branham's third and fourth assignments of error are overruled.

The judgment of the trial court is affirmed.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

SUNDERMANN, P.J., CUNNINGHAM and FISCHER, JJ.

To the clerk:

Enter upon the journal of the court on October 17, 2012

per order of the court _____.

Presiding Judge