

IN THE SUPREME COURT OF OHIO

Case No. **07-0291**

State of Ohio, :
Appellee, :
v. :
D. H. (a minor child) :
Appellant. :

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

Court of Appeals
Case No. 06AP-250

MEMORANDUM IN SUPPORT OF JURISDICTION

OF D. H. (A MINOR CHILD)

Yeura R. Venters (0014879)
Franklin County Public Defender

and

John W. Keeling 0014860, Counsel of Record
373 South High Street
Twelfth Floor
Columbus, Ohio 43215
Phone: (614) 719-8783
Fax: (614) 461-6470

Counsel for Appellant

Ron O'Brien 0017245
Prosecuting Attorney
Franklin County, Ohio
373 South High Street
Columbus, Ohio 43215
Phone: (614) 462-3555

and

Katherine J. Press 0023422, Counsel of Record
Assistant Prosecuting Attorney
Counsel for Plaintiff-Appellee

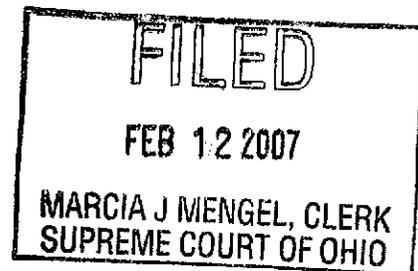


TABLE OF CONTENTS

	<u>Page</u>
EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION.....	1
STATEMENT OF THE CASE AND FACTS.....	2
ARGUMENT IN SUPPORT OF THE PROPOSITIONS OF LAW.....	7
Proposition of Law Number One: A juvenile has a constitutional right to a jury trial when the state seeks to punish him as an adult by imposing adult prison terms upon him. Therefore, a statute that requires a judge, rather than a jury, to make factual findings that require the imposition of an adult prison term upon a juvenile, is unconstitutional under <i>State v. Foster</i> , 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470 and <i>Blakely v. Washington</i> (2004) 542 U.S. 296, 124 Sup.Ct. 2531, 159 L.Ed.2d 403.	7
Proposition of Law Number Two: It is plain error for a court to fail to instruct on the law of self-defense and the defense of others when warranted by the facts and necessary for a fair determination of the case. A person who has consented to a confrontation with one individual does not lose his right to self-defense against other assailants when he is ambushed and attacked, without provocation, by other assailants whom he had not elected to confront.	14
CONCLUSION.....	15
PROOF OF SERVICE.....	15
APPENDIX	<u>Appx. Page</u>
Judgment Entry, Franklin County Court of Appeals,(Dec. 28, 2006)	A-2
Opinion of the Franklin County Court of Appeals (Dec. 28, 2006).....	A-3

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

The defendant-appellant (hereinafter referred to as the defendant) was tried in juvenile court as a serious youthful offender under R.C. 2152.13. If so charged and convicted, the defendant can be sentenced to an adult sentence as well as the traditional juvenile sentence. This is referred to as a blended sentence. Because adult punishment can be imposed, the defendant is entitled by statute to a jury trial as well as indictment by a grand jury. In the instant case, the statute provided that a jury had to determine the defendant's guilt but that the judge had to determine if facts existed which warranted the imposition of an adult sentence. In other words, the juvenile defendant in this case received a six-year adult prison term based upon facts decided by a judge and not by a jury.

On appeal, it was argued that this statutory scheme violated this Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. The Court of Appeals circumvented the application of *Foster* by holding that juveniles do not have a constitutional right to a jury trial even when faced with adult penalties including life imprisonment in an adult prison. Thus the constitutional issue is both plain and immense. Does a juvenile have a constitutional right to a jury trial when the state seeks to impose adult penalties upon him and punish him outside of the traditional juvenile system? The court in *In re Hill*, Allen App. No. 1-05-65, 2006-Ohio-2504, unreported, held that *Foster* does apply to the juvenile blended sentencing scheme. A motion to certify as a conflict is pending in the Court of Appeals on this issue.

Another issue of constitutional dimension is whether or not a person who consents to a confrontation with one individual, forfeits his right to self-defense if he is ambushed and attacked by other assailants whom he did not choose to confront.

STATEMENT OF THE CASE AND FACTS

The defendant was indicted on two counts of murder with respect to one person, one count of attempted murder and felonious assault with respect to another person and one count of attempted murder and felonious assault with respect to yet another person, for a total of six counts. A jury found the defendant not guilty of every count charged in the indictment but found him guilty of a lesser included offense of reckless homicide with a firearm specification.

The court sentenced the defendant to an adult sentence of three years on the reckless homicide with an additional three years on the firearm specification for a total adult prison term of six years. This sentence was stayed pending the successful completion of the juvenile sentence. The juvenile disposition resulted in the commitment of the defendant to the Department of Youth Services for an indefinite period of six months to a maximum period not to exceed the defendant's attainment of the age of twenty-one years. On the firearm specification the defendant received a consecutive sentence of juvenile institutionalization of three years. The Franklin County Court of Appeals upheld the conviction, the adult sentence, and the juvenile disposition.

This was a tragic case for everyone. A young sixteen-year old girl tragically died when she went to the aid of her younger brother who had been ambushed and attacked by a gang of men right outside of their home. The jury found that the defendant, a fifteen-year-old boy and a good friend of the younger brother, had unintentionally but recklessly fired the fatal shot in an attempt to scare away the gang of assailants and save the decedent's brother.

The defendant, a young fifteen-year-old boy, was a decent kid with no prior record and with no real problems before this incident. He was close to his family and had no history of drug or alcohol abuse. He was not in any gang and was described as being a "pretty normal young man" with no real emotional problems. The defendant, like the decedent, got caught up in events not of his making and beyond his control. He was confronted with a situation that resulted from a chain of events that he was not responsible for starting.

The defendant was at his home that night when he received a frantic call for help from the fifteen-year-old brother of the decedent, Christopher Harris, after Harris discovered that a gang of men were heading towards his house to confront him. The defendant pedaled his bicycle over to his friend's house in response to his friend's fearful plea for help.

According to Christopher Harris, the younger brother of the decedent, he had had prior problems with Preston Smith starting several months earlier. Smith was three years older than Harris and had been terrorizing him to the point that Harris feared for his life. In a previous encounter with Smith, one of Smith's associates had even shot at Christopher Harris. Later, Harris, on the night of the incident, called Smith in an attempt to resolve the hostility between them and suggested that if Smith would apologize for shooting at him, they could put the disagreement behind them. Smith hung up and, later, one of Smith's associates called and told Harris that Smith was on his way to Harris's house to fight him.

Harris was in his house with his sisters and a friend named Darius Schultz, who was also fifteen. Harris called the defendant for help and Harris also retrieved a gun from his father's car because of the prior history with Smith and the previous shooting

incident. After the defendant arrived on his bicycle, Harris gave the gun to the defendant.

The gang of men arrived shortly after the defendant and called out for Harris, the brother of the decedent. Supposedly, the offer was to fight, one-on-one, in order to resolve the differences between Harris and Preston Smith. Harris was apparently agreeable to fighting this older guy as a means of ending their disagreement since it was eminently preferable to being shot at. However, this gang of assailants had no intentions of engaging in any kind of a fair fight and had arranged to ambush the young boy, Christopher Harris.

According to the testimony, the gang of assailants arrived at the scene in three cars, possibly four. At least one of the gang of attackers was observed with a gun. Harris's sister ran into the crowd and admonished the attackers that no guns should be used. Harris was reluctant to fight Preston Smith because a "dude he was with had a gun in his hand." It was a semi-automatic according to Harris. Meanwhile, part of the gang had snuck around the back of Harris's house and suddenly appeared and several of them then jumped Harris and commenced to assault him. Harris's sister tried to help her brother. There was no real issue at trial with respect to these events, even the attackers admitted to ambushing and assaulting Harris. There was an issue with respect to whether or not the attackers fired gunshots or fired first.

According to Harris he heard shots being fired but could not tell which direction they were coming from. Harris saw the defendant with the gun he had given him but it was pointed up into the air and was not aimed at anyone.

According to Darius Schultz, after the gang had jumped Christopher Harris, the defendant yelled out for them to stop it. Schultz had gone into the yard to help and then

heard a gunshot close by. Schultz ducked and then grabbed Harris to get him to safety but let go of him. Schultz and the defendant ran up onto the porch. Schultz stated that the assailants were rushing up to the porch but he did not see any of the gang with guns. Schultz then heard gunshots from right next to him and saw the defendant shooting a gun. The gang scattered and Preston Smith ran off limping. Schultz stated that although he saw the defendant shooting, he did not see him shoot anyone. Schultz also stated that he did not see anyone from the gang actually shooting. Schultz also told the police that after Christopher Harris was attacked he hit the floor and then pulled the gun out and started shooting. Schultz tested positive for gunshot residue on his hand.

Keisha Harris, the thirteen-year-old sister of the decedent and Christopher Harris, testified for the state and indicated that she remembered people coming over in cars to fight her brother and that saw people running to my brother and fighting. She then heard shooting while she was standing on the porch. Immediately after the incident she told the police that she had seen two people firing guns that night and that the defendant had been firing into the air. But after she found out that the police suspected that the defendant had fired the fatal shot, she changed this part of her story. The attackers who testified generally denied having any guns. However, a stray round of live ammunition was found in one of the assailant's car shortly after the incident.

After the incident, a number of the participants were questioned by deputies at headquarters. Deputies interrogated the defendant with his mother and father present. His parents encouraged him to cooperate and to tell the truth. The defendant told the deputies that he became extremely fearful that something very bad was about to happen to his friend after he saw one of the attackers with a gun. He retrieved the gun

that belonged to his friend's dad from inside the house. After hearing the gunshots and seeing his friend jumped by multiple gang members, the defendant, who was then standing on the porch, fired multiple shots in order to scare off the assailants. He told the police that he was not trying to hit anybody. The defendant initially stated that he fired into the air away from everyone but after the deputies threatened him with the death penalty and being tried for murder as an adult, he agreed with their contention that maybe he had fired in the area of the attackers but maintained that he did not shoot at anyone.

Two people were shot during the melee. One of the attackers, Preston Smith, had a leg wound. He went to the hospital for about two hours for treatment and then went downtown to be interrogated by the deputies. However, Kiera Harris, died as a result of her attempt to defend her younger brother. She received a fatal chest wound. In each instance, the bullet entered and exited the body and no bullet was ever recovered. Thus there was no forensic evidence to establish that the bullet or bullets that hit the two people actually came from the gun fired by the defendant. The state argued that the defendant was the only one who fired a gun and that the bullet had to have come from his gun. A bullet was recovered from a house across the street that was of the same apparent caliber as the gun fired by the defendant but it could not be matched conclusively because of the damage to the bullet.

The general defense at trial was that the defendant was just trying to scatter the crowd and that he had no intent of hitting anyone when he fired the gun. It was also argued that it was not conclusively established that the bullet or bullets that caused the injuries were fired from the defendant's gun. The jury concluded that the defendant did

not knowingly shoot at anyone but that he had, in fact, recklessly caused the death of Kiera Harris by firing the gun. The jury found the defendant guilty of reckless homicide.

ARGUMENT IN SUPPORT OF THE PROPOSITIONS OF LAW

PROPOSITION OF LAW NUMBER ONE

A juvenile has a constitutional right to a jury trial when the state seeks to punish him as an adult by imposing adult prison terms upon him. Therefore, a statute that requires a judge, rather than a jury, to make factual findings that require the imposition of an adult prison term upon a juvenile, is unconstitutional under *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470 and *Blakely v. Washington* (2004) 542 U.S. 296, 124 Sup.Ct. 2531, 159 L.Ed.2d 403.

The defendant was tried as a serious youthful offender under R.C. 2152.13. By statute, the child is entitled to a jury trial because of the potential for an adult sentence. If so charged and convicted by a jury, the juvenile court must then impose upon the child one or more of the traditional juvenile dispositions authorized by law. Additionally, the child also faces the imposition of an adult sentence for his offense. Under certain circumstances, the imposition of the adult sentence is mandatory. Under other circumstances, the adult sentence cannot be imposed unless the court the court first makes certain findings on the record. If an adult sentence is imposed, it is then stayed pending the successful completion of the traditional juvenile dispositions imposed.

In the instant case, the defendant was convicted of reckless homicide with a firearm specification and a finding that he was fifteen years old at the time of the offense. This means that under R.C. 2152.11(F), the imposition of the adult sentence was discretionary and not mandatory and that the adult sentence could not be imposed unless the court made certain findings on the record. Under R.C. 2152.13(D)(2) the court is required to make the following findings:

- (i) If the **juvenile court on the record makes a finding that, given**

the nature and circumstances of the violation and the history of the child, the length of time, level of security, and types of programming and resources available in the juvenile system alone are not adequate to provide the juvenile court with a reasonable expectation that the purposes set forth in section 2152.01 of the Revised Code will be met, the juvenile court may impose upon the child a sentence available for the violation, as if the child were an adult, under Chapter 2929. of the Revised Code, except that the juvenile court shall not impose on the child a sentence of death or life imprisonment without parole.

Thus the trial court was not entitled to impose an adult sentence upon the defendant unless it first made certain factual findings on the record. Unless the court can make these findings, the only sentence that can be imposed upon the defendant is the traditional juvenile sentence.

It was argued in the Franklin County Court of Appeals that it was error to impose the adult sentence because under the law the trial court had no authority or jurisdiction to make findings that could add years of adult imprisonment to the defendant's juvenile disposition. This assignment of error was based upon the recent holdings by the Ohio Supreme Court in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, and by the United States Supreme Court in *Blakely v. Washington* (2004) 542 U.S. 296, 124 Sup.Ct. 2531, 159 L.Ed.2d 403,

In *State v. Foster, supra*, this Court specifically held that if a statute requires judicial fact-finding before the imposition of a sentence greater than that authorized by the jury verdict or admission of the defendant, then the statute is unconstitutional because only a jury can make findings that result in an increased sentence of confinement. The appellate court attempted to circumvent the obvious application of *Foster* principles by holding that juveniles do not have the right to a jury trial even if they are facing life imprisonment in an adult penal facility. The appellate court held at ¶59 that since the United States Supreme Court held in *McKeiver v. Pennsylvania* (1970),

403 U.S. 528, 545, that trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement, this Court's reasoning in *Foster, supra*, did not apply to juvenile defendants.

The appellate court then went on to say in ¶62 that “[t]he serious youthful offender statutes do not obviate the juvenile court's focus on rehabilitation rather than punishment.” The court then concluded that “given that appellant was tried in juvenile court, which, in contrast to the criminal court system, emphasizes rehabilitation over punishment, and given that the serious youthful offender statutes, including R.C. 2152.13(D)(2)(a), do not obviate the distinct rehabilitative aspects of the juvenile court system, we conclude that, pursuant to *McKeiver*, the Sixth Amendment as applied in *Blakely*, a case grounded in Sixth Amendment principles, does not confer jury trial rights on R.C. 2152.13(D)(2)(a) findings. The court then stated, at ¶63, that it determined that *Blakely* showed no intention to overrule the United States Supreme Court's well-established holding that the Sixth Amendment “right to a jury does not attach to **the traditional juvenile justice system.**” [emphasis added]

The appellate court's logic is fatally flawed because it is based upon *McKeiver's* holding that the right to a jury finding does not attach to the traditional juvenile justice system. The blended sentencing scheme, where a juvenile court can impose up to life imprisonment in an adult facility upon a minor, does not bear any resemblance to the traditional juvenile justice system where the focus was upon the treatment and rehabilitation of the juvenile and not the punishment thereof and the court's jurisdiction terminated when the juvenile became twenty-one years old.

This Court is well aware of the history of the juvenile justice system. In *In re Anderson*, 92 Ohio St.3d 63 2001-Ohio-131, 748 N.E.2d 67, this Court noted the history

of the traditional juvenile court and how it was first established in Illinois in 1899 after reformers had become appalled by the treatment of juveniles in criminal courts. The traditional juvenile court “was a benevolent system where the overriding concerns were the protection and rehabilitation of the child * * * and was premised on the legal doctrine of *parens patriae*, i.e., the state, as parent, had the duty to care for and guide these children with rehabilitation as the ultimate goal.” *Id.* 92 Ohio St.3d at 65.

It was this traditional juvenile court that the Supreme Court dealt with in *McKeiver v. Pennsylvania* (1970), 403 U.S. 528. The Court concluded that trial by jury in juvenile court was not a constitutional requirement and listed a number of reasons for this holding. [*Id.* 403 U.S. at 545] It noted the traditional rehabilitative and protective function of juvenile court and commented that it was not yet willing to abandon the traditional principles of juvenile court for a return to an adult system. [*Id.* 403 U.S. at 544, 546. The justices, in the plurality opinion, felt that imposing the constitutional right to a jury trial would interfere with the juvenile court’s rehabilitative goals.

Justice White, in his concurring opinion contrasted the differences between criminal court and juvenile court by noting that the consequences are more severe in criminal court and that the due process rights associated with jury trials for adults do not apply to juveniles because in the juvenile system:

[r]eprehensible acts by juveniles are not deemed the consequence of mature and malevolent choice but of environmental pressures (or lack of them) or of other forces beyond their control. Hence the state legislative judgment not to stigmatize the juvenile delinquent by branding him a criminal; his conduct is not deemed so blameworthy that punishment is required to deter him or others. Coercive measures, where employed, are considered neither retribution nor punishment. Supervision or confinement is aimed at rehabilitation, not at convincing the juvenile of his error simply by imposing pains and penalties. Nor is the purpose to make the juvenile delinquent an object lesson for others, whatever his own merits or demerits may be. A typical disposition in the juvenile court where

delinquency is established may authorize confinement until age 21, but it will last no longer and within that period will last only so long as his behavior demonstrates that he remains an unacceptable risk if returned to his family. Nor is the authorization for custody until 21 any measure of the seriousness of the particular act that the juvenile has performed.* * *

Not only are those risks that mandate juries in criminal cases of lesser magnitude in juvenile court adjudications, but the consequences of adjudication are less severe than those flowing from verdicts of criminal guilt. * * *

For me there remain differences of substance between criminal and juvenile courts. They are quite enough for me to hold that a jury is not required in the latter. [403 U. S. at 551-552.

The plurality of the justices held that the constitutional right to a trial by jury did not attach to the traditional juvenile court where the control over the juvenile terminated at the age of twenty-one because juvenile court was distinctively different from the criminal proceedings where the right to a jury trial is a constitutional right. However, it should be noted that Justice Brennan dissented on the one case and held that if a juvenile did not have the right to a public trial he should at least have the right to a trial by jury. Three other justices dissented entirely and held that if a juvenile faces incarceration until the age of twenty-one then the right to a trial by jury should attach.

A lot of changes have taken place in the juvenile justice system since *McKeiver* was decided in 1970. There was a public perception that juveniles were becoming more violent and prone to dangerous criminal acts. This was fueled in part by a spike in juvenile murder rates and crime that started in the eighties and peaked in 1994. This spike has been attributed, in large measure, to the chaotic development of crack markets in the inner cities in the late 1980's. Drug dealers and gangs actively recruited and armed juveniles to help them in fierce turf wars and to market their drugs. Additional crime was committed in order to purchase the drugs. Fear of this increase in juvenile violence caused most states to reverse a century-old practice of treating young

offenders differently from adult criminals and as a result public policy turned from rehabilitation to punishment in an attempt to provide the maximum protection for the public.

Most states developed a get tough policy on juveniles where the focus shifted from rehabilitation to lengthy confinement for violent offenders in order to protect the public. Adult punishment for violent offenders was the rubric of the day. Of course it was uniformly accepted that if the state wanted to impose adult punishment upon juveniles they would be entitled to adult protections and this meant that their cases would have to be heard in adult criminal courts. Juveniles were bound over to adult courts where they were treated as adults for purposes of trial and sentencing. By 1999 more than 8,500 juveniles were held in adult jails.¹ However, the experience did not work as well as anticipated. When the juveniles were eventually released from prison as adults, as most of them are, it was discovered that adult convictions and sentences carry long term consequences. Prison did not make them better people. Children incarcerated in adult facilities are 7.7 times more likely to commit suicide, 5 times more likely to be sexually assaulted, twice as likely to be beaten by staff, and 50% more likely to be attacked with a weapon than children incarcerated in juvenile institutions. Moreover, children in prison do not get the same educational or other services appropriate to their needs and generally are treated the same as the adult prisoners. They do not get the special programming and rehabilitation that their counterparts do in the juvenile system. They leave their terms of imprisonment with an adult record and less able to cope than the ones treated in the juvenile system. The rationale given for transferring juveniles to the criminal justice system was that more severe punishment

¹ James J. Stephan, *Census of Jails*, 1999, Bureau of Justice Statistics, February 2000.

and less concern for rehabilitation would result in reduced crime and greater public safety. However, studies comparing groups of similar juvenile offenders in the adult and juvenile systems have consistently shown that transfer has the opposite effect. Offenders transferred to the adult criminal justice system are more likely to reoffend, reoffend earlier, and to commit more serious subsequent offenses than those who remained in the juvenile system.

Because of this learning experience, the idea of the blended sentence was developed. Why not have a system that takes advantage of the programs and specialized rehabilitation in place in the juvenile system but one that also protects the public if the juvenile system fails in its goal of rehabilitation? The blended sentence takes advantage of the treatment options of the juvenile system but it has an adult sentence (in some cases even life imprisonment) hanging over the juvenile's head. If it appears that the rehabilitation is not working, then a judge can impose the adult sentence in order to further punish the juvenile and protect the public.

However, the implementation of this blended sentencing scheme was a bit problematic. In order to get the benefit of the juvenile rehabilitation resources, the juvenile justice system would have to retain jurisdiction. However, the constitutional scholars all knew that if the system wanted to inflict adult punishment upon juveniles, the system would have to provide the same due process and fair trial rights that it provides for adults, including the basic and fundamental right of a trial by jury. Therefore the legislation authorizing the imposition of blended sentences upon juveniles also provided for the right to a jury trial in the determination of the juvenile's guilt. However, this legislation was passed before *Blakely v. Washington* (2004) 542 U.S. 296, 124 Sup.Ct. 2531, 159 L.Ed.2d 403, and this Court's decision in *State v. Foster*,

109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, and the drafters of the legislation were not fully aware of the problems of creating a statutory scheme allowing a judge to impose years of imprisonment upon an accused based upon facts determined solely by the judge and not by a jury or upon the admission of the accused.

The Supreme Court in *McKeiver* held that juveniles were not entitled to a jury trial in juvenile court because the juvenile court system was different than the adult system in its treatment philosophy and punishment. However, when these differences disappear and the state attempts to impose an adult sentence in an adult prison facility, there is no reason and no justification for not providing the due process right of a jury trial to a juvenile who could be facing years of imprisonment, including a life sentence, from a juvenile court disposition. There is no way that the justices deciding *McKeiver* would have held that a juvenile would not have a right to a jury trial if he faced the same sentence and disposition as an adult. There is no way that this Court would ever hold that a juvenile could be sentenced to spend the rest of his life in prison without a jury trial. Thus to hold that *McKeiver* does not give jury trial rights to juveniles, who are being prosecuted with adult penalties, is more than improper, it is rather absurd given the general consensus that juveniles who are being prosecuted as adults must be provided adult due process protections, including the right to a jury trial.

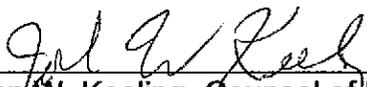
PROPOSITION OF LAW NUMBER TWO

It is plain error for a court to fail to instruct on the law of self-defense and the defense of others when warranted by the facts and necessary for a fair determination of the case. A person who has consented to a confrontation with one individual does not lose his right to self-defense against other assailants when he is ambushed and attacked, without provocation, by other assailants whom he had not elected to confront.

Defense of others was a factor in the evidence presented against the defendant. The defendant admitted firing a gun but only to scare off the assailants who were armed and who had ambushed his young friend. The right to attempt to scare off attackers was critical in the determination of the defendant's mental state. The Court of Appeals held that the defendant had no right to go to the aid of his friend because the defendant had agreed to engage in fisticuffs with another in order to settle their differences and that therefore the friend had no right to defend himself when he was ambushed and attacked by others whom he had not consented to fight. This is not the correct law. The defendant's young friend had a right to defend himself when he was ambushed and attacked by others and the defendant had a right to defend his friend from this violent and potentially lethal assault.

CONCLUSION

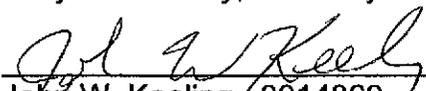
This case involves matters of public and great general interest and a substantial constitutional question that is already before this court in other cases. The appellant requests that this court grant jurisdiction so that the important issues raised herein can be reviewed on the merits.



John W. Keeling, Counsel of Record for Defendant

PROOF OF SERVICE

I certify that a copy of this memorandum in support of jurisdiction was served upon **Katherine J. Press**, Assistant Franklin County Prosecutor, 373 South High Street, 13th Floor, Columbus, Ohio 43215, by hand delivery on Monday, February 12, 2007.



John W. Keeling 0014860
Counsel for Defendant-Appellant

IN THE SUPREME COURT OF OHIO

State of Ohio,	:	Case No.
Appellee,	:	On Appeal from the
v.	:	Franklin County Court
D. H. (a minor child)	:	of Appeals, Tenth
Appellant.	:	Appellate District
		Court of Appeals
		Case No. 06AP-250

APPENDIX

TABLE OF CONTENTS

	<u>Appx. Page</u>
Judgment Entry, Franklin County Court of Appeals,(Dec. 28, 2006)	A-2
Opinion of the Franklin County Court of Appeals (Dec. 28, 2006).....	A-3

19231H13

FILED
COURT OF APPEALS
FRANKLIN COUNTY

2006 DEC 28 PM 12:06

CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	No. 06AP-250
	:	(C.P.C. No. 05CR04-2388)
v.	:	(C.P.C. No. 04JU12-17636)
	:	
D.H.,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on December 28, 2006, appellant's assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, is affirmed. Costs shall be assessed against appellant.

FRENCH, BROWN, and SADLER, JJ.

By Judith L. French
Judge Judith L. French

JUDITH W. KEELING
FRANKLIN CO PUBLIC DEFEND
373 SOUTH HIGH STREET
12TH FLOOR
COLUMBUS, OH 43215

A-2

2

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, : No. 06AP-250
 : (C.P.C. No. 05CR04-2388)
 v. : (C.P.C. No. 04JU12-17636)
 :
 D.H., : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

O P I N I O N

Rendered on December 28, 2006

Ron O'Brien, Prosecuting Attorney, and *Katherine J. Press*,
for appellee.

Yeura R. Venters, Public Defender, and *John W. Keeling*, for
appellant.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations, Juvenile Branch.

FRENCH, J.

{¶1} Defendant-appellant, D.H., a juvenile, appeals from the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, wherein the juvenile court, pursuant to a jury trial, adjudicated appellant a delinquent having committed two counts of reckless homicide, a third-degree felony, with firearm specifications, in violation of R.C. 2903.041 and 2941.145, respectively.

{¶2} The Franklin County Grand Jury indicted appellant on: (1) one count of murder with a firearm specification, in violation of R.C. 2903.02(A) and 2941.145 respectively; (2) one count of felony murder with a firearm specification, in violation of R.C. 2903.02(B) and 2941.145 respectively; (3) two counts of attempted murder with firearm specifications, in violation of R.C. 2923.02 (as it relates to R.C. 2903.02) and 2941.145, respectively; and (4) two counts of felonious assault with firearm specifications, in violation of R.C. 2903.11 and 2941.145, respectively. The charges stemmed from a December 27, 2004 incident. In particular, the murder and felony murder counts pertained to Kiera Harris' ("Kiera") death. Likewise, the attempted murder and felonious assault counts pertained to injuries sustained to Preston Smith ("Smith") and Brandon Russell ("Russell"). Additionally, each count specified that appellant, being 15 years old at the time of the offenses, used a firearm and, as such, was subject to a serious youthful offender sentence. A serious youthful offender is subject to a sentence prescribed under both juvenile and adult sentencing guidelines. See R.C. 2152.11 and 2152.13.

{¶3} Appellant's case was originally scheduled in the criminal division of the Franklin County Court of Common Pleas, which transferred the case to the juvenile division upon motion of plaintiff-appellee, the State of Ohio. The court recognized that, pursuant to R.C. 2152.13, serious youthful offender cases are tried in juvenile court. Thereafter, appellant invoked his jury trial rights provided under R.C. 2152.13(C)(1), which applies to juveniles being tried as a serious youthful offender.

{¶4} At trial, Smith testified to the following on appellee's behalf. On December 27, 2004, Christopher Harris ("Harris") called Smith on Smith's cell phone. ^{A-4}

After the phone conversation, Smith and his friends drove to Harris' house to engage in a fistfight with Harris and his friends. Neither Smith nor his friends brought a firearm. Harris exited his home when Smith and his friends arrived. Harris was with a group of friends, including appellant. The fistfight began, and, during the fight, appellant "went up on the porch[,] * * * point[ed]" a firearm, and shot Smith in the leg. (Tr. at 148.)

{¶5} On cross-examination, Smith verified that, at the time of the December 27, 2004 incident, Harris was a high school freshman, Smith was a high school senior, and Smith's friends "were all either [Smith's] age or older[.]" (Tr. at 159.) Smith also testified on cross-examination that, before the fight, Kiera asked Smith and his friends if they had any firearms.

{¶6} Sean Black ("Black") testified to the following on appellee's behalf. Black was part of Smith's group that fought with Harris on December 27, 2004. During the incident, Kiera "ran up and said that nobody is going to jump her brother[.]" Harris. (Tr. at 211.) Ultimately, Black heard gunshots coming from a porch.

{¶7} Russell was also part of Smith's group and testified that, during the December 27, 2004 fight, he heard gunshots "coming from [a] house[.]" (Tr. at 231.) Russell also testified that, after hearing the gunshots, he noticed bullet holes in his clothes.

{¶8} Erick Golden ("Golden") was also part of Smith's group and testified to the following on appellee's behalf. During the December 27, 2004 incident, Kiera "said don't bring no guns." (Tr. at 280.) Golden responded: "[W]e don't have no guns." (Tr. at 281.) Ultimately, appellant started shooting from a porch.

{¶9} Keisha Harris ("Keisha") is the sister of Harris and Kiera. Keisha testified to the following on appellee's behalf. During the December 27, 2004 incident, Keisha was on her front porch with appellant when she heard gunshots. Thereafter, she noticed that Kiera had been injured. Later that night, appellant told Keisha that he shot one of the fight participants in the leg and told her not to tell anyone that he shot the firearm.

{¶10} Harris testified to the following on appellee's behalf. On December 27, 2004, Eric Green ("Green") called Harris on his cell phone and stated that Smith wanted to meet Harris to fight. Meanwhile, Harris asked appellant to come over to his house, and he obtained his father's firearm. Harris then gave appellant the firearm when appellant arrived. Thereafter, Smith and his friends arrived, and Smith told Harris to "come and fight." (Tr. at 358.) Harris did not want to fight because an unidentified person with Smith had a firearm. Nonetheless, Harris told Smith "to come by [his] house in the middle of the street if he wanted to fight[.]" (Tr. at 358.) Smith and his friends walked up to Harris, and Russell hit Harris. After a fight ensued, Harris heard gunshots. At the time, Harris saw appellant pointing the firearm "at the air." (Tr. at 361.) After the gunshots were fired, Harris ran back to his house. At the house, appellant gave the firearm to Harris' father. Later, Harris found Kiera injured outside the house. Also, on the night of the incident, Harris noticed that appellant's brother, Jordan, had a firearm and someone "threw it under" an automobile. (Tr. at 369.)

{¶11} Deputy Coroner Collie Trant testified that Kiera died from a gunshot that pierced her lungs, aorta, and "the tissues that surround the heart[.]" (Tr. at 412.) Dr. Trant also verified that only one bullet caused Kiera's wounds.

{¶12} Darius Edwards ("Edwards") testified that he spoke with appellant the night of the shooting. According to Edwards, appellant admitted that he shot "one of those other guys." (Tr. at 497.)

{¶13} Darius Schultz ("Schultz") testified to the following on appellee's behalf. On December 27, 2004, Schultz was at Harris' house, and Harris called Smith on "speaker phone." (Tr. at 514.) Harris stated: "I'm going to give you a chance to apologize and we can drop everything." (Tr. at 514.) Smith responded: "[N]o you got me f'd up" and hung up the phone. (Tr. at 514.) Thereafter, Smith called back and stated that he wanted to fight with Harris. Thus, Harris obtained his father's firearm and called appellant. Appellant then came to Harris' house. Ultimately, Smith and his friends arrived, and Schultz went outside with Harris and the other individuals with Harris, including appellant. While outside, appellant had the firearm that Harris previously obtained. Smith and his friends "tried to jump" Harris, and appellant stated: "[H]old up." (Tr. at 529.) Schultz then heard gunshots and, ultimately, ran to Harris' porch, where he found appellant with the firearm. While appellant and Schultz were on the porch, Smith and his friends ran toward the porch, and appellant shot the firearm. Schultz admitted that he initially told law enforcement that appellant did not shoot the firearm.

{¶14} Gary Wilgus from the Ohio Bureau of Criminal Investigation and Identification ("BCI") testified that, when he searched Harris' house after the incident, he found the firearm used during the incident. Wilgus testified that the firearm had "a slight vinegar smell." (Tr. at 640.) Next, Wilgus testified that his office tested the firearm for fingerprints, but his office found no "identifiable latent fingerprints on the gun." (Tr. at

641.) Wilgus also testified that the crime scene was "snowy" and that it is "difficult to preserve the integrity of" a "snowy" crime scene. (Tr. at 644.)

{¶15} Eric Green ("Green") testified to the following on appellee's behalf. Green was socializing with Harris and his friends on December 27, 2004. The individuals were at Green's house. Ultimately, Green drove Harris and his friends to Harris' house. Next, Green went to Golden's house. While Green was at Golden's house, some individuals made "a couple phone calls." (Tr. at 674.) Thereafter, the individuals at Golden's house went to Harris' neighborhood. While at Harris' neighborhood, Green heard gunshots and surmised that the shooting came from one firearm.

{¶16} Franklin County Sheriff Detective Drew McEvoy testified that he and other detectives interviewed appellant after the December 27, 2004 incident. The detectives recorded the interview. Appellee played the recording at trial, and the interview included the following statements:

[APPELLANT]: * * * I came outside, saw everybody all fighting and stuff, went back inside and got the gun –

DETECTIVE SCOTT: Where'd you get the gun from?

[APPELLANT]: * * * [U]nder [Harris'] mattress, but he * * * got it from out of his dad's car. * * *

* * *

[APPELLANT]: And I went back and got the gun. I came back outside. I saw everybody, I saw [Harris] getting jumped. I fired three shots. That's all I can remember. Everything was going so fast. * * * [M]aybe I did empty the clip more than I thought I was. Stuff was going by so fast. Maybe – I couldn't remember. I don't know.

DETECTIVE SCOTT: So you had a friend that was getting beat up.

[APPELLANT]: Yes, getting jumped.

DETECTIVE SCOTT: And you felt that the way to protect your friend was –

[APPELLANT]: Was to try [to] scare them away.

* * *

[APPELLANT]: * * * Then I shot and then they all ran. And then I * * * heard a shot and I hurried up and ran inside. * * *

(Tr. at 744-745.) During the interview, appellant also stated that he "fired toward the ground." (Tr. at 747.) Lastly, Detective McEvoy testified that law enforcement did not test appellant for gunshot residue because "[a]t the time that we developed him as a suspect we were probably seven hours from the shooting[.]" (Tr. at 760-761.)

{¶17} Daniel Davison from BCI testified to the following on appellee's behalf. Davison examined gunshot residue samples from Schultz's and Kiera's hands. Davison found no gunshot residue from Kiera's hands, but Davison found residue from Schultz's left hand. According to Davison, the presence of gunshot residue does not only come from the "hand of a person firing a gun[.]" but may be found "on anything in the vicinity" of a fired weapon. (Tr. at 483.)

{¶18} During closing arguments, appellant's trial counsel argued that the evidence failed to "[put] that gun on [appellant]" and that "it doesn't even make sense that it was on him." (Tr. at 916.) Appellant's trial counsel also argued that law enforcement "never tried to find out if these kids could pick out the shooter. * * * And here we are 11 months later and now they are identifying that guy." (Tr. at 918-919.) Furthermore, appellant's trial counsel argued that no physical evidence linked appellant to the offenses, e.g., "[n]o gunshot residue, no prints, no nothing." (Tr. at 923.) Likewise,

appellant's trial counsel tried to discredit appellant's confession, noting: "[L]isten to the tape * * *. But then try and line it up with what happened, and you know what, it doesn't line up. None of it lines up. None of it makes sense." (Tr. at 932.) Appellant's trial counsel stated during closing arguments: "Are you comfortable beyond a reasonable doubt that [appellant] shot a gun? No." (Tr. at 932-933.)

{¶19} When the juvenile court issued its jury instructions, it instructed the jury on reckless homicide as lesser-included offenses to the murder and felony murder counts in regards to Kiera's death. The juvenile court noted that "[r]eckless homicide is defined as recklessly causing the death of another." (Tr. at 957.) The juvenile court also noted:

A person 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. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

(Tr. at 957.)

{¶20} Appellant's trial counsel requested no jury instructions on self-defense or defense of another. Appellant's trial counsel requested no jury instructions on the mental element of negligence as a comparative instruction to the mental element of recklessness, and did not request a jury instruction on negligent homicide as a lesser-included offense to murder and felony murder. In addition, the juvenile court did not provide any such instructions.

{¶21} The jury did not adjudicate appellant delinquent for the felony murder, murder, felonious assault, and attempted murder counts. However, the jury adjudicated the child to be a delinquent minor for having committed the offenses of reckless

homicide as lesser-included offenses to the felony murder and murder counts. Likewise, the jury found that appellant was 15 years old at the time of the incident. The jury also concluded that appellant had a firearm "on or about his person or under his control" and that appellant did "display, and/or brandish and/or indicate he possessed and/or used the firearm in the commission of the offense." Through such additional findings, the jury also adjudicated appellant delinquent on the accompanying firearm specifications and made appellant eligible for a blended adult/juvenile serious youthful offender sentence. R.C. 2152.11(A)(2), 2152.11(F)(2), and 2152.13.

{¶22} On February 8, 2006, the juvenile court held a sentencing hearing. As noted above, the juvenile court had authority to impose an adult sentence on appellant because appellant was tried as a serious youthful offender. See R.C. 2152.13. Due to the jury adjudicating appellant delinquent for reckless homicide, a third-degree felony, the imposition of the adult sentence was discretionary and not mandatory. See R.C. 2152.11(F).

{¶23} At the sentencing hearing, appellant's trial counsel argued against the juvenile court imposing a blended juvenile/adult serious youthful offender sentence. Specifically, appellant's trial counsel argued that "imposing such a sentence would be in violation of [appellant's] Fifth Amendment right, articulated under" *Blakely v. Washington* (2004), 542 U.S. 296. (Tr. at 1003.) Appellant's trial counsel then argued that, even if the juvenile court decided to impose a blended juvenile/adult serious youthful offender sentence, the juvenile court could not properly impose more than the minimum authorized prison sentence on the adult portion. In particular, appellant's trial counsel argued that the record does not support a non-minimum prison sentence, and

appellant's trial counsel also argued that "a maximum sentence, or even a non-minimum sentence would violate his right[s]." (Tr. at 1004.)

{¶24} The juvenile court then stated:

* * * I have the discretion to order a blended sentence on this reckless homicide because a firearm was used and the law requires me to use graduated actions and services to provide for the protection, care and mental and physical development of the child involved in this case. That is just part of the juvenile [serious youthful offender] statute. And I need to consider the circumstances and facts, the juvenile's history, the length of time level and juvenile history, and any adult sentence would be stayed or suspended pending any juvenile disposition.

* * * [Appellant] didn't have any real problems before this incident. He had no school suspensions, no drug or alcohol abuse, no prior mental treatment, no psychosis, according to the psychologist. * * *

* * *

For the felony, I can sentence him to a minimum of one to five years on the felony. The underlying felony and the underlying gun specification, three years. So the total could be four to eight years. And then of course I have to jump the bridge of what [appellant's trial counsel] wants, which is not to impose the serious youthful offender portion of the sentence at all, because it's now discretionary based on what the verdict was after the jury trial.

But one of the big factors is the seriousness of the offense. And * * * a firearm was used, and a little girl died. That is a big factor in the case.

* * * [B]ecause of the seriousness of this incident, I find that * * * the disposition should be that a serious youthful offender blended sentence should occur. * * *

(Tr. at 1010-1012.)

{¶25} In finding appellant a serious youthful offender, the juvenile court imposed an adult and juvenile sentence on appellant. As to the juvenile disposition, the juvenile

court committed appellant to the legal custody of the Department of Youth Services for an indefinite term of six months and a maximum period not to exceed appellant's attainment of 21 years of age. As to the adult sentence for appellant's third-degree felony reckless homicide, the juvenile court imposed a single three-year prison sentence, which is above the one-year minimum prison sentence authorized for such felonies. See R.C. 2929.14(A). Likewise, the juvenile court imposed an additional single three-year prison sentence on the accompanying firearm specifications.

{¶26} In imposing a non-minimum sentence on the reckless homicide, the juvenile court made findings under R.C. 2929.14(B) of Ohio's felony sentencing guidelines. Specifically, the juvenile court stated:

The adult portion then I need to look at the one to five years, and the seriousness of the offense, and why I could do the minimum or maximum. And based on the seriousness of the offense, that the shortest sentence to me would demean the seriousness of [appellant's] conduct. Court will sentence [appellant] to three years on the reckless homicide F-3. * * *

(Tr. at 1013.) The juvenile court then issued a judgment entry noting that it found appellant to be a delinquent minor child having committed the offense of reckless homicide with firearm specifications. The juvenile court also reiterated the above-noted blended juvenile/adult serious youthful offender sentence.

{¶27} Appellant appeals, raising three assignments of error:

ASSIGNMENT OF ERROR NUMBER ONE

THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT FAILED TO PROPERLY INSTRUCT THE JURY ON THE LAW RELEVANT TO SELF-DEFENSE AND THE DEFENSE OF OTHERS WHEN THE FACTS WARRANTED SUCH INSTRUCTIONS. THE TRIAL COURT FURTHER ERRED WHEN IT FAILED TO INSTRUCT ON THE DEFINITION OF CRIMINALLY NEGLIGENT CONDUCT SO THAT THE

JURY COULD PROPERLY COMPARE AND CONTRAST THE MENTAL STATES OF RECKLESS AND NEGLIGENCE. THE DEFENDANT WAS ALSO DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL AND THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO REQUEST THESE INSTRUCTIONS.

ASSIGNMENT OF ERROR TWO

THE TRIAL COURT ERRED WHEN IT IMPOSED AN ADULT SENTENCE UPON THE DEFENDANT BY MAKING PREDICATE FINDINGS THAT WERE CONSTITUTIONALLY IMPROPER FOR THE COURT TO MAKE UNDER *STATE V. FOSTER*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

ASSIGNMENT OF ERROR THREE

THE TRIAL COURT ERRED WHEN IT IMPOSED A SENTENCE GREATER THAN THE SHORTEST PRISON TERM AUTHORIZED FOR THE ADULT OFFENSE IN THE ABSENCE OF ANY FACTS, EITHER ADMITTED BY THE DEFENDANT OR FOUND BY A JURY, THAT WOULD HAVE ALLOWED THE TRIAL COURT TO DEPART FROM ITS OBLIGATION TO IMPOSE THE SHORTEST PRISON TERM UPON AN OFFENDER WHO HAD NEVER SERVED A PREVIOUS PRISON TERM PURSUANT TO R.C. 2929.14(B).

{¶28} In his first assignment of error, appellant contends that the juvenile court committed plain error by not providing a jury instruction on negligent homicide as a lesser-included offense to murder and felony murder, and, in general, by not providing a definition of the mental element of negligence as a comparative jury instruction with the mental element of recklessness. Appellant also claims that the juvenile court committed plain error by not providing jury instructions on self-defense and defense of another. Similarly, appellant contends that his trial counsel rendered ineffective assistance by not requesting the above-noted jury instructions. We disagree.

{¶29} As appellant recognizes, appellant's trial counsel did not request the above-noted jury instructions, and, thus, appellant has waived all but plain error on that issue. *State v. Coley* (2001), 93 Ohio St.3d 253, 266. Under Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." "By its very terms, the rule places three limitations on a reviewing court's decision to correct an error despite the absence of a timely objection at trial." *State v. Barnes* (2002), 94 Ohio St.3d 21, 27. Under the plain error standard:

* * * First, there must be an error, *i.e.*, a deviation from a legal rule. * * * Second, the error must be plain. To be "plain" within the meaning of Crim.R. 52(B), an error must be an "obvious" defect in the trial proceedings. * * * Third, the error must have affected "substantial rights." We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial. * * *

Id.

{¶30} We first address appellant's claim that the juvenile court committed plain error by not issuing a self-defense jury instruction. In order for a defendant to establish self-defense against danger of death or great bodily harm, he must prove 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 force; and (3) that he did not violate any duty to retreat or to avoid the danger. *State v. Jackson* (1986), 22 Ohio St.3d 281, 284; *State v. Griffin*, Montgomery App. No. 20681, 2005-Ohio-3698, at ¶18. In contrast, to establish self-defense against non-deadly force, the defendant must establish: (1) that the defendant was not at fault in

creating the situation giving rise to the altercation; and (2) that he had reasonable grounds to believe and an honest belief, even though mistaken, that he was in imminent danger of bodily harm and his only means to protect himself from such danger was by the use of force not likely to cause death or great bodily harm. *State v. Hansen*, Athens App. No. 01CA15, 2002-Ohio-6135, at ¶24; *Griffin* at ¶18.

{¶31} As indicated above, self-defense includes a "subjective * * * consideration of whether the defendant had an honest belief that he was" in danger. *State v. Robinson* (1999), 132 Ohio App.3d 830, 837. Here, appellant confessed that he shot the firearm because a group of men were harming Harris, and appellant "felt that the way to protect" Harris "[w]as to try [to] scare [the group] away" by shooting the firearm. (Tr. at 745.) Thus, by his admission, appellant did not act in self-defense when discharging the firearm, and the juvenile court did not commit plain error when it failed to provide a self-defense jury instruction.

{¶32} Furthermore, we conclude that the juvenile court did not commit plain error when it failed to provide an instruction on defense of another. Defense of another is a variation of self-defense. *State v. Moss*, Franklin App. No. 05AP-610, 2006-Ohio-1647, at ¶13. Under certain circumstances, an individual may use appropriate force to defend another. *Id.* However, "one who intervenes to help a stranger stands in the shoes of the person whom he is aiding, and if the person aided is the one at fault, then the intervenor is not justified in his use of force[.]" *State v. Wenger* (1979), 58 Ohio St.2d 336, 340; *Moss* at ¶13; see, also, *Ellis v. State* (1992), 64 Ohio St.3d 391, 394, citing *Wenger* at 339-340 (recognizing that "one who uses force to intervene in a conflict on behalf of another may not invoke a privilege of self-defense if the person defended was the

aggressor in the conflict"). (Emphasis omitted.) Moreover, in *State v. Smith*, Washington App. No. 02CA75, 2003-Ohio-1712, at ¶11, the Fourth District Court of Appeals held that an individual is not entitled to claim defense of another in regards to a physical altercation if the person being defended voluntarily entered the physical altercation.

{¶33} Here, Harris voluntarily entered the December 27, 2004 physical altercation and, pursuant to *Smith*, appellant was not entitled to claim defense of another. Specifically, Harris testified that, although he did not want to fight, he nonetheless exited his home and told Smith "to come by [his] house in the middle of the street if he wanted to fight[.]" (Tr. at 358.) Additionally, in light of Harris exiting his home and making such a statement, we find it significant that Harris also had appellant come over to his home before the fight.

{¶34} We also reject appellant's contention that the juvenile court committed plain error when it failed to provide a jury instruction on negligent homicide as a lesser-included offense to murder and felony murder. We conclude as such because negligent homicide is not a lesser-included offense to murder or felony murder. See *State v. Koss* (1990), 49 Ohio St.3d 213, 219; *State v. Brundage*, Hamilton App. No. C-030632, 2004-Ohio-6436, at ¶8.

{¶35} In addition, we reject appellant's contention that the juvenile court committed plain error by not providing a definition of the mental element of negligence as a comparative jury instruction with the mental element of recklessness, which, as noted above, is the mental state for reckless homicide, the crime for which the jury adjudicated appellant delinquent. Appellant asserts that such an instruction would have allowed the jury to compare the definition of negligence against the definition of

recklessness. Through such an argument, appellant is essentially maintaining that the jury might have acquitted appellant had it determined that appellant acted negligently and not recklessly, given that appellant was not charged with any crimes containing the negligent mental element, i.e., negligent homicide.

{¶36} We have previously recognized the benefits of providing, under certain circumstances, a jury instruction that compares definitions of mental elements, even though one of the mental elements does not pertain to the charges in the case. See *City of Columbus v. Akins* (Sept. 27, 1984), Franklin App. No. 83AP-977. However, *Akins* does not automatically require such instructions on comparative mental elements, and such comparative instructions may not be needed in cases where the provided instructions are adequate. See *State v. Courtright* (Sept. 2, 1986), Franklin App. No. 86AP-34; *State v. Montgomery* (Sept. 26, 2000), Franklin App. No. 99AP-1198. Here, pursuant to *Courtright* and *Montgomery*, we note that the juvenile court's jury instruction on recklessness tracked the statutory definition, and we conclude that the instruction adequately allowed the jury to consider the elements of reckless homicide. Accordingly, we determine that a comparative instruction on negligence was not warranted.

{¶37} Next, we address appellant's claim that his trial counsel rendered ineffective assistance by not requesting the above-noted jury instructions. The United States Supreme Court established a two-pronged test for ineffective assistance of counsel. *Strickland v. Washington* (1984), 466 U.S. 668. First, the defendant must show that counsel's performance was outside the range of professionally competent assistance and, therefore, deficient. *Id.* at 687. Second, the defendant must show that counsel's deficient performance prejudiced the defense and deprived the defendant of a

fair trial. *Id.* A defendant establishes prejudice if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

{¶38} A properly licensed attorney is presumed competent. *State v. Samatar*, 152 Ohio App.3d 311, 2003-Ohio-1639, at ¶88, citing *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 301. Moreover, there is " 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]' " *State v. Bradley* (1989), 42 Ohio St.3d 136, 142, quoting *Strickland* at 689. In matters regarding trial strategy, we will generally defer to defense counsel's judgment. *State v. Carter* (1995), 72 Ohio St.3d 545, 558; see, also, *State v. Carpenter* (1996), 116 Ohio App.3d 615, 626, citing *Bradley* at 144 (holding that we are to "presume that a broad range of choices, perhaps even disastrous ones, are made on the basis of tactical decisions and do not constitute ineffective assistance"). We will only reverse on trial strategy grounds if defense counsel's trial strategy deviated from the standard of reasonableness. *State v. Burgins* (1988), 44 Ohio App.3d 158, 160; *State v. Newsome*, Ashtabula App. No. 2003-A-0076, 2005-Ohio-3775, at ¶8.

{¶39} Here, we conclude that appellant's trial counsel's failure to request the above-noted jury instructions did not constitute ineffective assistance. See *Strickland* at 687, 694. First, we find that reasonable trial strategy supports appellant's trial counsel's decision not to request a jury instruction on self-defense or defense of another. Appellant's trial counsel argued that the evidence failed to establish that appellant shot the firearm that caused Kiera's death. As noted above, self-defense, and concomitantly

the related defense of another, serve as a " 'justification for admitted conduct.' " See *City of Columbus v. Peoples*, Franklin App. No. 05AP-247, 2006-Ohio-1718, at ¶46. Such defenses "[represent] more than a 'denial or contradiction of evidence which the prosecution has offered as proof of an essential element of the crime charged[.]'" *Id.*, quoting *State v. Poole* (1973), 33 Ohio St.2d 18, 19. Rather, self-defense and defense of another "[admit] the facts claimed by the prosecution and then rel[y] on independent facts or circumstances which the defendant claims exempt him from liability." (Emphasis omitted.) *Peoples* at ¶46. Thus, it would have been " 'logically and legally inconsistent' " for appellant's trial counsel to assert for appellant both self-defense and defense of another while also arguing that appellant did not shoot the firearm that caused Kiera's death. See *Peoples* at ¶48, quoting *State v. Powell* (Sept. 29, 1997), Ross App. No. 96CA2257. Similarly, we recognize the above-noted record support for appellant's trial counsel's defense and, therefore, we have no cause to second-guess appellant's trial counsel's strategy to forgo self-defense and defense of another arguments and instead argue that the evidence failed to establish that appellant shot the firearm that caused Kiera's death. See *Carter* at 558; *Carpenter* at 626, citing *Bradley* at 144.

{¶40} Next, we note that it would have been futile for appellant's trial counsel to request a jury instruction on negligent homicide as a lesser-included offense to murder or felony murder, given that we have stated above that negligent homicide is not a lesser-included offense to such crimes. See *Koss* at 219; *Brundage* at ¶8. Thus, appellant's trial counsel was not ineffective for failing to make such a futile request. See *State v. Jones* (June 13, 2000), Franklin App. No. 99AP-704. Similarly, we find that appellant's trial counsel was not ineffective for failing to request a jury instruction on the

mental element of negligence as a comparative instruction to the mental element of recklessness, given our above conclusion that such an instruction was not warranted. See *Jones*.

{¶41} Again, we conclude that the juvenile court did not commit plain error by not providing the above-noted jury instructions, and we conclude that appellant's trial counsel did not render ineffective assistance by failing to request the above-noted jury instructions. As such, we overrule appellant's first assignment of error.

{¶42} We next address appellant's second assignment of error, which concerns his blended juvenile/adult sentence for reckless homicide with a firearm specification. As noted above, upon adjudicating appellant delinquent on reckless homicide, the jury also found that appellant was 15 years old at the time of the incident, that appellant had a firearm "on or about his person or under his control[,] and that appellant did "display, and/or brandish and/or indicate he possessed and/or used the firearm in the commission of the offense." Through such additional findings, the jury made appellant eligible for a serious youthful offender sentence. R.C. 2152.11(A)(2), 2152.11(F)(2), and 2152.13. A serious youthful offender is subject to a sentence prescribed under both juvenile and adult sentencing guidelines. See R.C. 2152.11 and 2152.13. Due to appellant's delinquency adjudication for reckless homicide, a third-degree felony, the imposition of the adult sentence was discretionary, not mandatory. See R.C. 2152.11(F). R.C. 2152.13(D)(2)(a) governs a juvenile court's discretion to impose a blended juvenile/adult sentence on a serious youthful offender and states:

If a child is adjudicated a delinquent child for committing an act under circumstances that allow, but do not require, the juvenile court to impose on the child a serious youthful

offender dispositional sentence under section 2152.11 of the Revised Code, all of the following apply:

(i) If the juvenile court on the record makes a finding that, given the nature and circumstances of the violation and the history of the child, the length of time, level of security, and types of programming and resources available in the juvenile system alone are not adequate to provide the juvenile court with a reasonable expectation that the purposes set forth in section 2152.01 of the Revised Code will be met, the juvenile court may impose upon the child a sentence available for the violation, as if the child were an adult, under Chapter 2929. of the Revised Code, except that the juvenile court shall not impose on the child a sentence of death or life imprisonment without parole.

(ii) If a sentence is imposed under division (D)(2)(a)(i) of this section, the juvenile court also shall impose upon the child one or more traditional juvenile dispositions under sections 2152.16, 2152.19, and 2152.20 and, if applicable, section 2152.17 of the Revised Code.

Further, under R.C. 2152.13(D)(2)(a)(iii):

(iii) The juvenile court shall stay the adult portion of the serious youthful offender dispositional sentence pending the successful completion of the traditional juvenile dispositions imposed.

{¶43} R.C. 2152.01, referenced in R.C. 2152.13(D)(2)(a), establishes the purposes for juvenile dispositions and states, in pertinent part:

(A) The overriding purposes for dispositions under this chapter are to provide for the care, protection, and mental and physical development of children subject to this chapter, protect the public interest and safety, hold the offender accountable for the offender's actions, restore the victim, and rehabilitate the offender. * * *

{¶44} Thus, R.C. 2152.13(D)(2)(a) sets out a two-tiered approach once a minor is adjudicated delinquent under circumstances that allow, but do not require, a blended juvenile/adult serious youthful offender sentence: (1) the court must make findings that

the juvenile sentence is not adequate to meet the purposes in R.C. 2152.01; and (2) if the court makes those findings, then the court may impose an adult sentence.

{¶45} After exercising its discretion to impose a blended juvenile/adult sentence on a serious youthful offender, "[t]he juvenile court shall stay the adult portion of the serious youthful offender dispositional sentence pending the successful completion of the traditional juvenile dispositions imposed." R.C. 2152.13(D)(2)(a)(iii). However, under R.C. 2152.14(E), the juvenile court may later invoke the adult portion of a serious youthful offender sentence on a juvenile if, after a hearing, the juvenile court finds on record by clear and convincing evidence that: (1) the juvenile is serving the juvenile portion of a serious youthful offender dispositional sentence; and (2) the juvenile is at least 14 years of age and has been admitted to a department of youth services facility, or criminal charges are pending against the juvenile. Additionally, to invoke the adult sentence under R.C. 2152.14(E), the juvenile court must find on record by clear and convincing evidence either of the following: (1) the juvenile, after reaching 14 years of age and while in custody of a department of youth services' facility, violated rules of the facility by committing any felony or a first-degree misdemeanor offense of violence; (2) the juvenile, after reaching 14 years of age and while in custody of a department of youth services' facility, engaged in conduct that creates a substantial risk to the safety or security of the facility, the community or the victim; (3) the juvenile, while on community control or parole, violated a condition of the community control or parole by committing any felony or a first-degree misdemeanor offense of violence; or (4) the juvenile, while on community control or parole, engaged in conduct that creates a substantial risk to the safety or security of the community or of the victim. Lastly, to

invoke the adult sentence under R.C. 2152.14(E), in addition to the above factors, the juvenile court must find that the juvenile's conduct demonstrates that he or she is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction. The juvenile court "may modify the adult sentence the court invokes to consist of any lesser prison term that could be imposed for the offense and, in addition to the prison term or in lieu of the prison term if the prison term was not mandatory, any community control sanction that the [juvenile] was eligible to receive at sentencing." R.C. 2152.14(E)(2).

{¶46} Here, in challenging the juvenile court's decision to impose the blended juvenile/adult sentence, appellant first contends that the juvenile court failed to specify on the record all of the requisite findings under R.C. 2152.13(D)(2)(a)(i), i.e.:

* * * [G]iven the nature and circumstances of the violation and the history of the child, the length of time, level of security, and types of programming and resources available in the juvenile system alone are not adequate to provide the juvenile court with a reasonable expectation that the purposes set forth in section 2152.01 of the Revised Code will be met * * *.

According to appellant, the juvenile court found that appellant committed a serious offense, that appellant used a firearm, and that someone died from appellant's actions. Nonetheless, appellant argues, the juvenile court did not find, pursuant to R.C. 2152.13(D)(2)(a)(i), that "the length of time, level of security, and types of programming and resources available in the juvenile system alone are not adequate to provide the juvenile court with a reasonable expectation that the purposes set forth in section 2152.01 of the Revised Code will be met[.]"

{¶47} However, in finding that a blended juvenile/adult sentence was warranted, the juvenile court mentioned at the sentencing hearing its responsibility to impose a

sentence that will "provide for the protection, care and mental and physical development" of appellant, which are dispositional purposes under R.C. 2152.01 and, thus, factors for consideration under R.C. 2152.13(D)(2)(a). (Tr. at 1010.) The juvenile court also mentioned its consideration of other factors under R.C. 2152.13(D)(2)(a), i.e., "the length of time[,] level and juvenile history," and, as appellant acknowledges, the juvenile court recognized the seriousness of appellant's offense. (Tr. at 1010.) As such, we conclude that the juvenile court referenced the requisite factors to impose a blended juvenile/adult sentence pursuant to R.C. 2152.13(D)(2)(a).

{¶48} Alternatively, appellant asserts that the juvenile court imposed the blended juvenile/adult sentence after making findings under R.C. 2152.13(D)(2)(a) in violation of constitutional jury trial principles and in contravention of *Blakely* and *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856.

{¶49} The Sixth Amendment to the United States Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury[.]" Under the Fourteenth Amendment, the Sixth Amendment is applicable to the states. *Duncan v. Louisiana* (1968), 391 U.S. 145, 148.

{¶50} "It was not anticipated that jury rights may be implicated in sentencing until *Apprendi v. New Jersey* [2000], 530 U.S. 466[.]" *Foster* at ¶3. In *Apprendi*, the United States Supreme Court examined New Jersey's hate-crime statute, which allowed an enhanced sentence if the judge found by a preponderance of the evidence that racial bias was a motive for the offense. *Id.* at 468-469. The trial court imposed such an enhanced sentence against a defendant's conviction for second-degree felony unlawful possession of a bomb. *Id.* at 468-471. In imposing the enhanced sentence, the trial

court found by a preponderance of the evidence that the defendant had a racial bias in committing the unlawful possession of a bomb offense. *Id.* at 471. The enhanced sentence exceeded the ten-year maximum sentence allotted for non-enhanced second-degree felonies. *Id.* at 468-469, 471. The United States Supreme Court concluded that the defendant's sentence violated Sixth Amendment jury trial principles and stated that, in accordance with the Sixth Amendment, the jury, rather than a judge, must find all facts essential to punishment. *Id.* at 490, 497.

{¶51} Specifically, the United States Supreme Court stated:

* * * The question whether [the defendant] had a constitutional right to have a jury find * * * bias on the basis of proof beyond a reasonable doubt is starkly presented.

Our answer to that question was foreshadowed by our opinion in *Jones v. United States* [(1999), 526 U.S. 227], construing a federal statute. We there noted that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id.* at 243, n. 6, 119 S.Ct. 1215. The Fourteenth Amendment commands the same answer in this case involving a state statute.

Apprendi at 476-475.

{¶52} The United States Supreme Court then ultimately concluded:

In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones*. Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.
* * *

Apprendi at 490.

{¶53} "In *Blakely* * * *, the *Apprendi* rule was broadened." *Foster* at ¶5. In *Blakely*, a defendant pled guilty in Washington state court to second-degree kidnapping involving domestic violence and use of a firearm, a felony carrying a ten-year maximum prison penalty. *Blakely* at 298-299. However, other sentencing provisions specified a standard range of 49 to 53 months for second-degree felony kidnapping with a firearm. *Id.* at 299. Yet, a judge may impose a sentence above the standard range upon finding " 'substantial and compelling reasons justifying an exceptional sentence.' " *Id.*, quoting Wash.Rev.Code Ann. 9.94A.120(2).

{¶54} In *Blakely*, the trial court imposed a prison term of 90 months, after making a finding that the defendant acted with " 'deliberate cruelty,' " one of the statutorily enumerated grounds that justified an exceptional sentence. *Id.* at 300, quoting Wash.Rev.Code Ann. 9.94A.390(2)(h)(iii). The United States Supreme Court held that the defendant's sentence violated his Sixth Amendment right to a jury trial because a jury did not find the facts that permitted the enhanced sentence. *Id.* at 304-305. Although the prosecution argued that the trial court had not violated *Apprendi* because the statutory maximum was ten years, the United States Supreme Court held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* * * * In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (Emphasis sic.) *Blakely* at 303-304. In so concluding, the court made no exception for whether the "determined facts *require* a sentence enhancement or merely *allow* it[.]" (Emphasis sic.) *Blakely* at 305, fn. 8. A-27

{¶55} Since appellant's sentencing, the Ohio Supreme Court decided the applicability of *Blakely* to Ohio's felony sentencing laws in *Foster*. In *Foster*, the Ohio Supreme Court concluded that portions of Ohio's felony sentencing statutes violate the Sixth Amendment to the United States Constitution in the manner set forth in *Blakely*. *Foster* at ¶¶50-83. Specifically, the court stated that, under certain circumstances, the felony sentencing statutes require a trial court to make "specific findings before imposing a sentence beyond that presumed solely by a jury verdict or admission of a defendant." *Id.* at ¶54. Accordingly, in *Foster*, the Ohio Supreme Court severed the unconstitutional statutes from Ohio's felony sentencing laws. *Id.* at ¶99. The Ohio Supreme Court then concluded that cases pending on direct review "must be remanded to trial courts for new sentencing hearings[.]" *Id.* at ¶104.

{¶56} In *State v. Draughon*, Franklin App. No. 05AP-860, 2006-Ohio-2445, at ¶7, we acknowledged the "broad language the Supreme Court of Ohio used in *Foster* when it ordered resentencing for all cases pending on direct review." However, we concluded that "a defendant who did not assert a *Blakely* challenge in the trial court waives that challenge and is not entitled to a resentencing hearing based on *Foster*." *Id.* In so concluding, we "consider[ed] the language used in *United States v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738, the case that *Foster* relied on in arriving at" its decision to sever the unconstitutional statutes from Ohio's felony sentencing laws. *Draughon* at ¶7. "In *Booker*, the United States Supreme Court applied *Blakely* to the Federal Sentencing Guidelines. The *Booker* Court applied its holding to all cases on direct review." *Draughon* at ¶7. However, the *Booker* court "expected reviewing courts to apply 'ordinary prudential doctrines,' such as waiver * * * to determine whether to

remand a case for a new sentencing." *Draughon* at ¶7, quoting *Booker* at 268. "Thus, in accordance with the well-settled doctrine of waiver of constitutional challenges, and the language in *Booker*, we [held] that a *Blakely* challenge is waived by a defendant sentenced after *Blakely* if it was not raised in the trial court." *Draughon* at ¶8.

{¶57} Here, appellee contends that appellant waived the argument that the Sixth Amendment jury trial right enunciated in *Blakely* and *Foster* precluded the juvenile court from making findings under R.C. 2152.13(D)(2)(a). Appellee notes that appellant's trial counsel instead argued to the juvenile court that appellant's *Fifth* Amendment rights "articulated under" *Blakely* precluded the juvenile court from making R.C. 2152.13(D)(2)(a) findings.

{¶58} A party waives error on appeal when the party "could have called, but did not call, to the trial court's attention" error that "could have been avoided or corrected by the trial court." *State v. Williams* (1977), 51 Ohio St.2d 112, paragraph one of the syllabus, modified on other grounds, *State v. Gillard* (1988), 40 Ohio St.3d 226. Here, although appellant's trial counsel referenced appellant's Fifth Amendment rights when arguing against the juvenile court making R.C. 2152.13(D)(2)(a) findings, appellant's trial counsel also essentially advised the juvenile court to adhere to *Blakely*, a case grounded in Sixth Amendment jury trial principles. In this regard, under *Williams*, we cannot say that appellant's trial counsel waived the argument that appellant brings on appeal, i.e., that *Blakely*, a case grounded in Sixth Amendment jury trial principles, precluded the juvenile court from making R.C. 2152.13(D)(2)(a) findings. We therefore examine appellant's claim whether the juvenile court imposed the blended juvenile/adult sentence after making findings under R.C. 2152.13(D)(2)(a) in violation of jury trial

principles afforded by the Sixth Amendment and in contravention of *Blakely* and, as recognized after appellant's sentencing, *Foster*.

{¶59} Under Ohio law, a juvenile subject to a serious youthful offender blended juvenile/adult sentence is entitled to a jury trial in juvenile court. See R.C. 2152.13(C)(1). However, we note that, in *McKeiver v. Pennsylvania* (1970), 403 U.S. 528, 545, the United States Supreme Court held in a plurality opinion that "trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement" under the Sixth Amendment. In doing so, while acknowledging the disappointments within the juvenile court system, the United States Supreme Court recognized that the juvenile system was established " '[i]n theory' " to " 'be helpful and rehabilitative rather than punitive.' " *Id.* at 544, fn. 5, quoting President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime (1967), 7-9 ("Task Force Report"). The United States Supreme Court also recognized that, " '[i]n theory the [juvenile] court's operations could justifiably be informal, its findings and decisions made without observing ordinary procedural safeguards, because it would act only in the best interest of the child.' " *McKeiver* at 544, quoting Task Force Report at 9. Likewise, the court recognized that " '[w]hat should distinguish the juvenile from criminal courts is greater emphasis on rehabilitation, not exclusive preoccupation with it.' " *McKeiver* at 546, fn. 6, quoting Task Force Report at 9. In examining the nature of the juvenile court system, the United States Supreme Court concluded that "[t]here is a possibility, at least, that the jury trial, if required as a matter of constitutional precept, will remake the juvenile proceeding into a fully adversary process and will put an effective end to what has been the idealistic prospect of an

intimate, informal protective proceeding." *McKeiver* at 545. Similarly, the court concluded that "[i]f the jury trial were to be injected into the juvenile court system as a matter of right, it would bring with it into that system the traditional delay, the formality, and the clamor of the adversary system[.]" *Id.* at 550. Lastly, the court did recognize that "[i]f, in its wisdom, any State feels the jury trial is desirable in all cases, or in certain kinds, there appears to be no impediment to its installing a system embracing that feature. That, however, is the State's privilege and not its obligation." *Id.* at 547; see, also, *In re Anderson* (2001), 92 Ohio St.3d 63, 66 (recognizing that *McKeiver* declined to mandate jury trial rights in juvenile proceedings); see, also, *In re Cundiff* (Jan. 13, 2000), Franklin App. No. 99AP-364 (reiterating that *McKeiver* held that "'trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement'").

{¶60} In *United States ex rel Murray v. Owens* (C.A.2, 1972), 465 F.2d 289, 292, the United States Court of Appeals for the Second Circuit analyzed *McKeiver* and stated that "the conclusion is inescapable that the Supreme Court in no way implied that jury trials were constitutionally required if the ultimate disposition following an adjudication of delinquency was the same as for older offenders." The court also stated that the United States Supreme Court's rationale for not providing a Sixth Amendment right to a jury trial in juvenile proceedings "is not altered by whether the juvenile once adjudged a delinquent, is committed to a juvenile or an adult facility." *Id.*

{¶61} Thus, in accordance with *Owens*, whether the Sixth Amendment jury trial right as applied in *Blakely* applies to R.C. 2152.13(D)(2)(a) findings is not determined by the serious youthful offender's potential adult sentence. Similarly, as *McKeiver* suggests, the provision in R.C. 2152.13(C)(1) that provides a jury trial right in a serious

youthful offender case is, itself, irrelevant to whether the Sixth Amendment as applied in *Blakely* imposes such jury trial rights to R.C. 2152.13(D)(2)(a) findings. See *McKeiver* at 547.

{¶62} Rather, we initially note that a juvenile tried as a serious youthful offender is under the jurisdiction of the juvenile court, which, in contrast to criminal courts, according to *McKeiver*, places a greater emphasis on rehabilitation rather than punishment. See *McKeiver* at 546, fn. 6. The serious youthful offender statutes do not obviate the juvenile court's focus on rehabilitation rather than punishment. As an example, before actually requiring a juvenile to serve the adult sentence, after previously pronouncing such a sentence at the sentencing hearing, the juvenile court must determine, in pertinent part, that the juvenile is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction. See R.C. 2152.14(E). Likewise, R.C. 2152.01 emphasizes that the "overriding purposes" for juvenile court dispositions are, in pertinent part, "to provide for the care, protection, and mental and physical development of children" and to "rehabilitate the offender[.]" and, under R.C. 2152.13(D)(2)(a), the juvenile court must consider such "overriding purposes" when initially deciding at the sentencing hearing whether to impose a blended juvenile/adult sentence on a serious youthful offender. To be sure, R.C. 2152.01 also notes that the "overriding purposes" for juvenile dispositions are to "protect the public interest and safety, hold the offender accountable for the offender's actions [and] restore the victim[.]" However, such other factors merely confirm *McKeiver's* recognition that the juvenile court places " 'emphasis on rehabilitation' " but " 'not exclusive preoccupation with it.' " See *McKeiver* at 546, fn. 6, quoting Task Force Report at 9. Accordingly, given that appellant was tried in juvenile

court, which, in contrast to the criminal court system, emphasizes rehabilitation over punishment, and given that the serious youthful offender statutes, including R.C. 2152.13(D)(2)(a), do not obviate the distinct rehabilitative aspects of the juvenile court system, we conclude that, pursuant to *McKeiver*, the Sixth Amendment as applied in *Blakely*, a case grounded in Sixth Amendment principles, does not confer jury trial rights on R.C. 2152.13(D)(2)(a) findings.

{¶63} In so concluding, we emphasize that *Blakely* "showed no intention * * * to overrule [the United States Supreme Court's] well-established holding that the [Sixth Amendment] right to a jury does not attach to the traditional juvenile justice system." *State v. Meade* (Wash.App. 2005), 129 Wash.App. 918, 925-926, citing *McKeiver*. "*Blakely* did not alter long-standing rules regarding when the right to a jury attaches; it merely broadened and delineated the scope of that right once it does attach." *Meade* at 926.

{¶64} Next, we acknowledge that *Foster* applied *Blakely* to invoke Sixth Amendment jury trial rights to Ohio's adult felony sentencing guidelines. See *Foster* at ¶50-83. For the reasons noted above, we also conclude that *Foster's* application of the Sixth Amendment jury trial rights to Ohio's adult felony sentencing guidelines has no bearing on the juvenile court's authority to make findings under R.C. 2152.13(D)(2)(a) when deciding whether to impose a blended juvenile/adult sentence on a serious youthful offender.

{¶65} For the purposes of complete and logical analysis extending from the above Sixth Amendment jury trial considerations, we next address the applicability of Section 5, Article I of the Ohio Constitution, which states that the "right of trial by jury

shall be inviolate," and Section 10, Article I of the Ohio Constitution, which provides for the right to "speedy public trial by an impartial jury[.]" These sections preserve for an accused " 'all essential and distinguishing features of the trial by jury' known to the common law in Ohio." *Foster* at ¶12, quoting *Work v. State* (1853), 2 Ohio St. 296, syllabus. *Foster*, which was issued after appellant's sentencing, cited to such Ohio constitutional jury trial rights in its decision on the applicability of constitutional jury trial rights to Ohio's adult felony sentencing statutes. *Foster* at ¶12; see, also, *State v. Brooks*, Mahoning App. No. 05MA31, 2006-Ohio-4610, at ¶44 (noting that "the *Foster* decision was also based upon Ohio constitutional law dealing with the jury trial right").

¶66 The Ohio Supreme Court has previously held that the Ohio Constitution does not provide the right to a jury trial in juvenile delinquency proceedings. *In re Agler* (1969), 19 Ohio St.2d 70, 77-78. In *Agler*, the Ohio Supreme Court noted that, at the time, juveniles adjudicated delinquent in juvenile court were detained in facilities separate from adult facilities. *Id.* at 73. While the serious youthful offender statutes no longer provide such a distinction, we note that *Agler* declined to extend Ohio constitutional jury trial rights to juvenile delinquency proceedings upon recognizing that juvenile proceedings are "noncriminal," and upon recognizing the "individualized, remedial nature" of juvenile court adjudications. *Id.* at 78-79. As noted above, the serious youthful offender statutes do not obviate such rehabilitative-focused aspects of the juvenile court system. Accordingly, pursuant to *Agler*, we conclude that *Foster's* application of Sections 5 and 10, Article I of the Ohio Constitution to the adult felony sentencing statutes has no bearing on the juvenile court's authority to make findings

under R.C. 2152.13(D)(2)(a) when deciding whether to impose a blended juvenile/adult sentence on a serious youthful offender.

{¶67} Therefore, based on the above, we conclude that the juvenile court did not make the R.C. 2152.13(D)(2)(a) findings in violation of appellant's constitutional jury trial rights articulated under the Sixth Amendment to the United States Constitution and Sections 5 and 10, Article I of the Ohio Constitution, or in contravention of *Blakely* and *Foster*. In so concluding, we note that appellant does not raise the implications of the statutory jury trial right that R.C. 2152.13(C)(1) affords serious youthful offender cases. Thus, we do not analyze whether R.C. 2152.13(C)(1) implicates the juvenile court's authority to make the R.C. 2152.13(D)(2)(a) findings. Rather, based on the issues that appellant has presented, our decision here is solely based on an analysis of R.C. 2152.13(D)(2)(a) findings and a conclusion that such findings are not implicated by jury trial rights established in the Sixth Amendment to the United States Constitution and Sections 5 and 10, Article I of the Ohio Constitution, as well as the application of such jury trial rights in *Blakely* and *Foster*.

{¶68} Accordingly, having rejected appellant's alternative arguments above, we determine that the juvenile court did not err when it imposed a blended juvenile/adult sentence on appellant upon making R.C. 2152.13(D)(2)(a) findings. As such, we overrule appellant's second assignment of error.

{¶69} Appellant's third assignment of error concerns the adult portion of the blended juvenile/adult sentence for his third-degree felony reckless homicide delinquency adjudication. As noted above, R.C. 2152.13(D)(2)(a) governs the juvenile

court's discretion to impose an adult sentence on a serious youthful offender and states, in pertinent part:

(i) If the juvenile court on the record makes a finding that, given the nature and circumstances of the violation and the history of the child, the length of time, level of security, and types of programming and resources available in the juvenile system alone are not adequate to provide the juvenile court with a reasonable expectation that the purposes set forth in section 2152.01 of the Revised Code will be met, the juvenile court may impose upon the child a sentence available for the violation, as if the child were an adult, under Chapter 2929. of the Revised Code, except that the juvenile court shall not impose on the child a sentence of death or life imprisonment without parole.

{¶70} Here, the juvenile court imposed a single three-year prison sentence for appellant's third-degree felony reckless homicide, which is a sentence above the one-year minimum prison sentence authorized for adult sentences on third-degree felonies. See R.C. 2929.14(A). In imposing the non-minimum sentence on the reckless homicide, the juvenile court made findings under R.C. 2929.14(B) of Ohio's adult felony sentencing statutes. Appellant argues that the juvenile court imposed such a sentence in violation of jury trial principles afforded by the Sixth Amendment and in contravention of *Blakely* and *Foster*. In *Foster*, the Ohio Supreme Court applied *Blakely* and concluded that R.C. 2929.14(B) violated Ohio and federal constitutional jury trial principles. See *Foster* at ¶61. The Ohio Supreme Court then severed R.C. 2929.14(B) from the adult felony sentencing statutes. *Foster* at ¶99.

{¶71} Initially, we note that appellant's third assignment of error poses a question that applies to the adult part of serious youthful offender sentences, like appellant's, imposed before *Foster* severed unconstitutional portions of Ohio's adult

felony sentencing statutes in R.C. Chapter 2929. As such, we only address adult sentences on serious youthful offender sentences imposed pre-*Foster*.

{¶72} Here, the adult felony sentencing statutes did not directly authorize the juvenile court to impose the adult sentence on appellant. Rather, as noted above, the authority stemmed from R.C. 2152.13(D)(2)(a) of the serious youthful offender statutes, which referred the juvenile court to the adult felony sentencing statutes. Ultimately, the juvenile court still imposed the blended juvenile/adult serious youthful offender sentence under the dictates of R.C. 2152.13(D)(2)(a) and, overall, the serious youthful offender provisions, which, as noted above, do not obviate the juvenile court's focus on rehabilitation rather than punishment. Thus, although the juvenile court was imposing an adult sentence on appellant, it was doing so under the rehabilitative confines of the juvenile system and the serious youthful offender statutes. As further demonstration of this rehabilitative focus, we reiterate that, before the juvenile court would actually make appellant serve the adult portion of the sentence, the juvenile court would have to determine, pursuant to R.C. 2152.14(E) of the serious youthful offender statutes, in pertinent part, that appellant is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction.

{¶73} Thus, it necessarily follows from our above analysis in appellant's second assignment of error that *Blakely*, *Foster*, the Sixth Amendment to the United States Constitution, and Sections 5 and 10, Article I of the Ohio Constitution, did not confer jury trial rights on the R.C. 2929.14(B) findings that the juvenile court made when it imposed the adult portion of the serious youthful offender sentence. As such, we conclude that the juvenile court did not make the R.C. 2929.14(B) findings in violation of constitutional

jury trial rights articulated under the Sixth Amendment to the United States Constitution and Sections 5 and 10, Article I of the Ohio Constitution, or in contravention of *Blakely* and *Foster*. In so concluding, we reiterate that, based on the issues appellant presented, we do not analyze whether R.C. 2152.13(C)(1) implicated the juvenile court's R.C. 2929.14(B) findings. Accordingly, based on the above, we overrule appellant's third assignment of error.

{¶74} In summary, we overrule appellant's first, second, and third assignments of error. Consequently, we affirm the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch.

Judgment affirmed.

BROWN and SADLER, JJ., concur.
