

IN THE SUPREME COURT OF OHIO

2007

07-1366

State of Ohio, :
Appellee, : On Appeal from the Greene
vs. : County Court of Appeals.
Kyle J. Smith, : Second Appellate District
Appellant, : Court of Appeals
Case No. 2006-CA-68

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT KYLE J. SMITH

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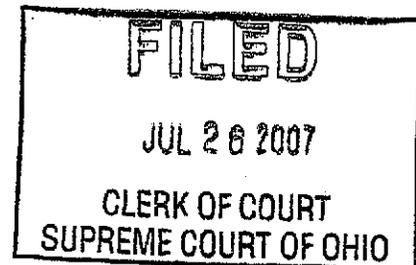


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MEMORANDUM IN SUPPORT OF JURISDICTION
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EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST AND
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This Court, in this particular case, has the opportunity to answer the age old question encompassed in the Separation of Powers Doctrine.

It is a general accepted rule that 'a court must first look to the language of the statute itself to determine the legislative intent; and the statute must be applied if its meaning is clear, unequivocal and definite.'

The question presented here is, whether the trial court and the Court of Appeals of Montgomery County have usurped their statutory authority in making rulings that deny appellant's rights that have been statutorily prescribed by the Legislature of Ohio.

The Legislature specifically wrote into law that anyone who negligently commits a crime with a deadly weapon or dangerous ordanance maybe so ccharge. The Lower Courts in this particular case have mæde a point to specifically rule otherwise.

Both the Court of Common Pleas and the Court Of Appeals Of the Second District have stated that Appellant Kyle J. Smith should and could not be charged with the crime (as they interpret) of Negligent Homicide.

The Constitutional question presented here, is whether these Courts have the right to deny defendant the right to a charge of negligent homicide, that is to be decided by a jury.

Appellant says the answer to the question is a resounding no, they are not. They have usurped their authority, as the judicial branch, with these decisions, and have instead encroached into the area of statutory construction, which is the sole province of the legislature.

In so doing, have violated appellants Due Process and Equal Protection Rights governed by the Sixth and Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

The Defendant, Kyle Smith, was indicted by the Grand Jury for Greene County, Ohio for one count of Murder with a firearm specification and three years mandatory imprisonment, contrary to and in violation of R.C. 2903.02(A); one count of Voluntary Manslaughter with a firearm specification and three years mandatory imprisonment, contrary to and in violation of R.C. 2903.03(A) and a felony of the first degree; and one count of Reckless Homicide with a firearm specification and three years mandatory imprisonment, contrary to and in violation of R.C. 2903.041(A) and a felony of the third degree.

After entering a plea of not guilty at the arraignment, the Defendant filed a Motion to Suppress evidence. A hearing was held on the Defendant's motion, and it was overruled in its entirety.

At some point not apparent from the record, the charge of Voluntary Manslaughter with the accompanying firearm specification was dismissed. The case proceeded to trial on the two charges of Murder and Reckless Homicide, and the two firearm specifications.

After hearing all of the evidence, the jury acquitted the Defendant of Murder, but found him guilty of Reckless Homicide. The jury further found that during the commission of the offense, the Defendant used, displayed, and brandished an operable firearm. The Defendant was sentenced to a period of four years imprisonment on the conviction of Reckless Homicide, and for a mandatory period of three years on the gun specification.

It is from the Defendant's conviction that he now appeals.

STATEMENT OF THE FACTS

Roni Spears spent her last Thanksgiving on this earth surrounded by her family at her sister's house in Cincinnati, Ohio in November of 2005. The next day, she and her sister engaged in this country's Black Friday ritual, shopping at 4:30 a.m., to get a jump start on their Christmas shopping. Roni and her sister had a wonderful day together, laughing and shopping. Roni purchased a fleece shirt for her boyfriend, the Defendant Kyle Smith, that day. Meanwhile, the Defendant by his own admission, attempted to call Roni numerous times that day, but he could not reach her. He was unaware that Roni's cell phone was not working and she was not able to make contact with him until they returned from shopping at sometime after 9:30 p.m.

After her sister went to bed at 10:30 p.m., Roni apparently made contact with the Defendant. According to the Defendant, the two began to argue over her son's father and/or whether she had been with another man that day. According to the Defendant, he invited her to come to his apartment that night, but then he broke up with her and he did not realize she was going to drive to his house. At some point, Roni packed up her son, J.S., and drove to Fairborn, Greene County, Ohio to speak with the Defendant in person.

Although J.S. was present at the scene, he is five years old and did not testify at trial.

Marietta Gaynor, the Defendant's next door neighbor, testified that she heard an argument start. She testified that it lasted about fifteen minutes. She heard arguing back and forth. Although she really couldn't make out what was being said, she could hear Roni was upset and crying. Next she heard like some banging on the wall. This

noise gave her the impression that someone was being thrown against the wall multiple times. That is when she called 911 because she felt that it was getting out of hand and she was afraid for Roni's safety. She then heard the Defendant yell to go upstairs, which she assumed was directed toward J.S.. After the police arrived, she heard the Defendant exclaim something to the effect of "I don't want to die" or "I don't want her to die."

The Defendant gave varying accounts of what happened after she arrived at his apartment. In his first version of events to Officer Hern, the Defendant states that he had no idea Roni was coming over to his house. He further states that he didn't want to let her in because they had been arguing, but he did because she had J.S. with her. He said when they came in, he remembered that his gun was on the computer table so he decided to pick it up and put it in his pocket and he went to sit down in a chair in the living room. He said they began arguing back and forth and she stated she wanted to get some of her belongings. He advised that he told her to go ahead and that is when a physical altercation began between the two of them. He advised that they began to tussle, and as they were arguing and fighting, the gun fell out of his pocket. He advised that he was able to grab it before it hit the ground, but then they continued to fight and the gun just went off and he accidentally shot her.

A little while later, the Defendant agrees to speak with Det. Jahns and Capt. Plemmons. His next version was that when Roni arrived at his home, she bumped him on her way in, then she swung at him, and then he nudged her back. He said then she began to take her stuff off, and he went to sit in the chair by his desk. He said Roni began demanding that he return her phone and money, and he told her to come take the phone. He said she then approached him and began to rip his shirt, so he grabbed his gun, which

just happened to be sitting on his desk. Then the tussle begins and they are grabbing back and forth, and while he was trying to keep the piece away from her, the gun went off. That is when he told J.S. to go upstairs and called 911 himself. He concluded by saying this was totally an accident. He further said that after the gun went off, Roni stood there for a few seconds and then collapsed forward on her side.

The Defendant repeatedly states that he typically keeps his loaded gun on his desk in his front room, except when his son is there. When challenged by the fact that he had just taken his son back to his mother earlier in the day, the Defendant then says that he was going to take it with him, but he just left it out on the desk. He also he repeatedly states that although he did not want the altercation to get serious between them, he leaves the gun out as a deterrent. Further, he repeatedly states that Roni was trying to get in between him and his desk during the tussle when the gun allegedly went off, but the crime scene sketch that was introduced shows that she is not behind the desk at the time of the shooting based on where her body collapsed. Moreover, the firearms experts agree that she had to be at least eighteen inches to two feet away from the barrel of the gun when she is shot. When pressed by the Detective that his story is not logical, he finally discloses the following version of the events.

When Roni arrived, she apparently went to the living room to take off J.S.'s coat. The Defendant advised when she bumped him on the way in and he nudged her back, he realized things might get ugly and he went upstairs to get his gun. When he came back downstairs with the gun in his pocket, he advised that is when he and Roni began to argue again. According to the Defendant, he asked her to leave and she refused because she wanted the phone. He told her to come and take it. He said that is when he took

out the gun and placed it on the desk as a deterrent. He said that she proceeded to come towards him and grabbed his shirt, ripping it. He advised that although she was unarmed, he was afraid for his safety and he stepped back and chambered a round in the gun. When he got the gun back up, that is when he squeezed the trigger in self-defense.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law I:

APPELLATE COUNSEL IS INEFFECTIVE WHEN HE FAILS TO REPRESENT HIS CLIENT TO THE BEST OF HIS ABILITIES WHEN THE RELEVANT CASE LAW FOR THAT DEFENSE IS READILY AVAILABLE AND APPELLATE COUNSEL FAIL TO RESEARCH THAT CASE LAW.

Proposition of Law II;

THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN REFUSING TO GIVE A JURY INSTRUCTION FOR NEGLIGENT HOMICIDE VIOLATING APPELLANTS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 10 AND 16, ARTICLE 1 OF THE OHIO CONSTITUTION.

Proposition of Law III:

THE TRIAL COURT'S FAILURE TO GIVE THE JURY INSTRUCTION FOR NEGLIGENT HOMICIDE WAS "PLAIN ERROR."

ARGUMENT

For the purpose of judicial economy, appellant will present these three Proposition of Law together, as they are sunstantially intertwined as argument for achieving the same desired response.

Every since having been convicted in this matter, I have had a persistent and nagging feelings concentering this conviction. Essentially these feeling revolve arounf, "something just ain't right," so my immediate reaction was to start to try and research my case and try and find out as much as possible.

Starting from a logical perspective instead of a legal one, (because I have no legal training), I went at the problem from a common since approach. The problem stems from the fact that I have always questioned why I was not allowed to have the instruction on the lesser offense of negligent homicide.

On March 26, 2006, I was convicted of the Charge of Reckless Homicide and a Gun specification, the sentence for the charge and specification totaled (7) seven years.

I was informed by Appellate Counsel that the transcripts for my case had been sent to the Appellate Courts on June 29, 2006, and I inturn responded informing appellate ccounsel that I was concerned about how the appeal would proceed. I told ccounsel that I trusted his integrety and skills and that I believed that his knowledge of law would help me persevere. (see: letter assigned as

Also included in this letter dated August 17, 2006, I expressed my concerns about why the judge did not allow the instruction on th lesser offense.

Along with this letter I sent a copy of some hand written notes that I had compiled for the viewing of the attorney, to help in their research in my case. see:

Previcus to the letter written on August 17th, I had written appellate attorney and had specifically stated that I would like more information concerning whether the charges, at this juncture of the case, could be reduced to negligent homicide see Letter date August 10, 2006).

None of these inquiries were ever answered by appellant ccounsel and clearly by the following information that is attached to this Memorandum, appellate counsel was ineffective in his efforts to gain a favorable appeal for his client.

Appellant claims here that appellate ccounsel's performance as balanced against the evidence that he now present before this court, was ineffective, in regards to his representation of appellant in this appeal.

Again appellant started from the perspective of logic, and that start sent me in the direction of the intent of the legislature when it was decided to impliment a law concerning negigent homicide.

This area of research sent me to:

Statutory Text for Legislative Intent

Which states:

The foremost consideration in determining the meaning of a statue is legislative intent. To determine the legislative intent the Court must first review the statutory language, [] * * * [according] to the words used and their usual normal, or customary meaning.

When plain and unambigucius statutory language conveys a clear and definite meaning, there is no need for court's to apply rules of statutory interpretation; the court must give effect to the words used.

In reviewing a statue, a court cannot pick one sentence and disassociate it from the context, but must look to the enacting body. see: **State v. Jackson** 811 N.E. 2d. 68, **State ex. rel. Wolf v. Delaware Cty. Bd. of Education** 724 N.E. 2d. 771, **Jones v. Conrad** 750 N.E. 2d. 583, **State v. Elam** 629 N.E. 2d. 442.

As decided in **State v. Taylor** WL 26339 (attached as **Exhibit D**):

A striking characteristic of the code section is that there is a single societal interest to be protected, and a series of declining degrees of responsibility and punishment. Each section prohibits the causing of a death of another, and each has a lesser degree of culpability.

The "elements" of the careless use of a deadly weapon, is entirely new.

The inclusion of this section, a creation of this new offense as a kind of homicide, indicates a clear legislative intent to emphasize not the "element" of the crime, but the idea of that the degree of the crime and its lesser included offenses depends on the degree of culpability.

Ohio Revised Code 2945.71 requires a two step process before a lesser offense instruction is given the jury **Merriweather** 64 Ohio St. 2d. 75.

First, it must be determined whether the offense is, by language of the code itself, lesser and included. The legislature of this state has provided a workable test of making the determination.

An instruction will not be given unless the evidence present at trial would allow a jury to reasonably find the defendant guilty of the lesser offense, but not guilty of the charged offense. see: **State v. King** supra 64. Ohio Revised Code 2901.22(D) provides:

" A person acts negligently when, because of a substantial lapse of due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or maybe of a certain nature. A person is negligent with respect to circumstances when, because of the substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances may exist."

Negligence is based on inadvertance to risk, a criminal negligence requires a substantial lapse from due care in a given set of circumstances, negligent homicide did not exist in Ohio prior to 1974, nor did it exist in any state prior to the drafting of the Model Penal Code in 1959.2.

By including negligent homicide in the code, the legislature intended to reach this kind of culpability. Thus, if part of the purposeful killing might reasonably fail, an instruction on negligent homicide should be given where the proof might reasonably establish that death was negligently caused by the use of a deadly weapon or dangerous ordnance.

In any event to say that negligent homicide is not a lesser included offense of murder solely because murder requires purposefulness while negligent homicide requires the lesser culpability of negligence is to defeat the whole purpose of the criminal code to impose penalties for culpable acts.

Keeping in mind that sections of the revised code defining offenses must be strictly construed against the State. Ohio Revised Code 2901.04(A)

Thus, killing with a deadly weapon or dangerous ordnance could be either negligent homicide or murder (or manslaughter), depending on the mental state of the killer. Killing by any other means, such as poisoning or pushing the victim off a cliff, can never be negligent homicide, or murder.

Where the evidence in a criminal case would support a finding by the jury of guilt of the lesser offense included in the offense for which the defendant was tried, it is prejudicial error for the trial court to refuse to instruct at the defenses request, an instruction of the lesser offense. **State v. Ferra** 400 N.E. 2d. 885.

An offense may be a lesser included offense of another if (i) the offense carries a lesser penalty than the other (ii) the greater offense cannot, statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed and (iii) some element of the greater offense is not required to prove the commission of the lesser offense. **State v. Deans** 533 N.E. 2d. 294.

Appellant's case fits all three elements listed above and thusly, his case fits squarely with the exceptions stated above.

Quoting from *State v. Banks*:

" Under appropriate circumstances, negligent homicide is a lesser included offense of murder. see *State v. Jenkins* 468 N.E. 2d. 387.

An analysis of whether one offense is a lesser included offense of another must commence with whether a person could be convicted of both offenses at the same trial if charged with both. If conviction of the greater would necessarily preclude conviction of the lesser offense upon the same facts, the two offenses are so related that the lesser is included in the greater.

The *Jenkins* Court predicated its determination solely upon comparison of statutory language and concluded that negligent homicide is not a lesser included offense of murder, because in some murder cases, a charge upon negligent homicide would be precluded by the facts, even though in some cases the facts would present a possible case of negligent homicide rather than murder.

In most cases of negligent homicide a charge of murder would also be appropriate since the degree of the offense would depend solely on the culpable mental state of the defendant, that is, whether the killing was purposeful or negligent.

Accordingly, we conclude that, whether a lesser included offense is involved depends upon the evidence adduced at trial and cannot be determined solely by comparison of statutory language, which must be consulted to determine whether the lesser offense could be, rather than always is included within the greater offense.

In other words, where it would be possible for the same evidence to prove both a greater offense and lesser offense depending upon the mental state of the accused, the lesser offense is a lesser included offense of the greater offense even though it might be possible to prove the commission of the greater offense without proving the commission of the lesser. see: **State v. Loudermill** 206 N.E.2d. 198."

As is in **Banks**, in this particular case, the State sought to prove the elements of murder i.e. that the defendant (1) purposefully (2) caused the death of another. Negligent homicide has three elements: (1) negligently (2) causing the death of another (3) by means of a deadly weapon or ordnance.

When appellant called the police he told them that he had shot the victim thusly, an admission that a gun was used in this crime.

Also as in **Banks** the jury found against the State on the issue of purposefulness, but held for the state that the defendant did cause the death of the victim, and uncontravertedly, was that the jury found that the death was caused by a deadly weapon.

The only unsolved problem is whether the jury would have found that the death was by negligence, and that decision was never afforded to the jury.

There is only one trier of fact left to determine this issue and this case presented in this manner, is now before this court.

The trial court was required to instruct the jury of the lesser included offense of negligent homicide, and in not doing so, committed prejudicial error against the defendant.

As these two issues are Argued together, appellant states that appellate counsel was negligent in his duties by not arguing relevant case law in defense of his client.

As a laymen in the law, appellant believes that if, and that a big IF, he was capable of discovering these cases that so closely mirror his own, then surely trained appellate counsel should have been able to do the same.

CONCLUSION:

For the above reason, Defendant-appellant, Kyle J. Smith, respectfully request that his case be remanded to the trial court with instruction for a ruling that the trial court committed prejudicial error on not instructing on the lesser included offense and that defendant-appellant could be sentenced accordingly.

CERTIFICATE OF SERVICE:

I hereby certify that a copy of the foregoing document has been served upon Elizabeth A. Ellis, GREEN COUNTY PROSECUTOR, 61 Gree Street, Xenia, Ohio 45385, via the United States mail this _____ day of _____ 2007.

Kyle J. Smith #519-011
Chillicothe Correctional Inst.
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IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

STATE OF OHIO :
Plaintiff-Appellee : C.A. CASE NO. 2006 CA 68
v. : T.C. NO. 2005 CR 924
KYLE J. SMITH : (Criminal Appeal from
Defendant-Appellant : Common Pleas Court)

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OPINION

Rendered on the 15th day of June, 2007.
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.....

WOLFF, P.J.

Kyle J. Smith was convicted after a jury trial in the Greene County Court of Common Pleas of reckless homicide with a firearm specification. The court sentenced him to four years in prison for reckless homicide, to be served consecutively to a mandatory term of

three years in prison for the firearm specification. Smith appeals from his conviction, arguing that the court should have given a jury instruction for negligent homicide and that his counsel rendered ineffective assistance. For the following reasons, Smith's conviction will be affirmed.

According to the evidence presented at trial, Smith and the victim, Roni Spears, had an on again-off again romantic relationship. On November 25, 2005, the day after Thanksgiving, Spears spent the day shopping with her sister, Deatra Smith ("Deatra"), in the Cincinnati area. Because the battery for her cell phone was dead, she did not communicate with Smith during the day. When Deatra went to bed at 10:30 p.m., Spears was sitting on a loveseat in Deatra's home, watching a movie with other family members.

After Deatra had gone to bed, Spears made contact with Smith. According to Smith, the two began to argue about the father of Spears's five-year old son and/or whether she had been with another man that day. Although Smith had invited Spears to come to his residence, he broke off their relationship during the argument, and he told her not to come. Sometime thereafter, Spears and her son drove to Smith's apartment in Fairborn, Ohio. They arrived at approximately 12:30 a.m.

When Spears arrived, Smith did not want to let her into his apartment, but he let her enter because she had brought her son and it was cold outside. Spears pushed her way past Smith as she walked in the door. Once inside, Spears took off her son's coat, and he sat on the couch while the argument between Spears and Smith continued. Smith's neighbor, Marietta Gaynor, heard Spears yelling, crying, and cursing at Smith. The argument lasted approximately fifteen minutes. Gaynor was initially concerned that Spears was being a domestic violence victim. She soon heard the sound of banging against the

wall, and she called the police "because it sounded like it was getting out of hand." She then heard someone yell at someone else to go upstairs. According to Smith, Spears had grabbed and ripped his shirt, the two had "tussled," and Spears was shot with Smith's Bersa 40-caliber semiautomatic pistol. Spears stood for a moment and then fell to the floor. When Smith realized that Spears had been shot, he called 911 and ordered Spears's son to go upstairs. After the police arrived, Smith was taken into custody and transported to jail. Spears died from a gunshot wound to her chest. Spears also had a bruise behind her left ear and a slight injury to her lip.

After his arrest, Smith gave varying detailed accounts of what had happened after Spears arrived at his apartment. After being booked into the jail, Smith told Officer James Hern that, when Spears and her son arrived, he remembered that his gun was on a computer table by the door, so he decided to pick it up and put it in the pocket of his jogging suit top. He then sat down on a chair in the living room while Spears argued with him. He and Spears continued to argue back and forth until Spears said that she was going to get some of her belongings. Smith had responded, "Go ahead." Spears wanted to get a telephone next to him. Smith stood up, and a physical altercation began. Spears and Smith tussled, the gun fell out of his pocket, and he caught it while it was falling. As they continued to fight, the gun went off and he accidentally shot Spears.

Detective Steven Jahns and Captain Doctor Plemmons subsequently interviewed Smith at 8:30 a.m. that morning. At this time, Smith initially stated that he was sitting in his desk chair when Spears came around the desk and tried to get between him and the desk. Spears grabbed his shirt and ripped it. In response, Smith grabbed the gun and told Spears to "leave me alone." Smith stood up, and he and Spears tussled while going

around the desk. Smith stated that he stepped back from Spears and the gun went off accidentally. Smith indicated that he normally kept his gun on the desk, and he stated that it had never been in his pocket.

Although Smith first stated that the gun had been on the desk throughout the weekend, he later stated he had gotten the gun out that morning. As the interview progressed, Smith stated that he retrieved the weapon from upstairs "maybe an hour" before Spears arrived. He stated that he was worried about his safety but "the gun was already there before she got there." Later still, Smith stated that he had retrieved the gun from upstairs while Spears was taking off her son's coat. He repeatedly indicated that he intended the gun to be a deterrent. At the end of the interview, Smith stated that Spears had grabbed and ripped his shirt, that they had started tussling, and that he had grabbed the gun out of self-defense because Spears was swinging at him. Smith then cocked the gun and pulled the trigger. Smith consistently denied that he had shot Spears intentionally or that he had done so out of anger.

Smith's and Spears's hands were tested for gunshot residue. Smith had gunshot residue on his hands, but Spears did not. In addition, no gunpowder particles were found on Spears's leather jacket. The state's evidence indicated that Smith's weapon would deposit gunpowder particles out to two feet from the gun, thus suggesting that Spears was farther than two feet from the weapon when she was shot.

In his defense, Smith's expert did not agree that gunpowder particles would be present out to two feet from the gun when tested on a leather jacket. He testified that his tests revealed few gunshot particles on a leather jacket at 12 inches and that he could not conclude that the weapon would deposit particles at 18 inches from the gun. This

testimony was apparently intended to demonstrate that the absence of gunshot particles on Spears's jacket was not significant for determining whether Spears was close to Smith when she was shot. Smith also presented testimony from a Silverton police officer who had previously responded to a call in which Smith alleged that Spears had assaulted him. A former Silverton police officer also testified that, at Smith's request, he previously had been dispatched to escort Smith to Spears's residence so that Smith could retrieve his personal belongings. Gaynor also testified on behalf of Smith.

On December 1, 2005, Smith was indicted for murder, in violation of R.C. 2903.02(A); voluntary manslaughter, in violation of R.C. 2903.03(A); and reckless homicide, in violation of R.C. 2903.041. Each count included a firearm specification. The state subsequently dismissed the voluntary manslaughter charge. The remaining two charges were tried before a jury on March 20-22, 2006. Smith was convicted of reckless homicide with the firearm specification but acquitted of murder and the accompanying firearm specification. On April 21, 2006, the court filed a termination entry, sentencing him accordingly.

Smith raises four assignments of error on appeal, which we will address in a manner that facilitates our analysis.

I. "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO GIVE A JURY INSTRUCTION FOR NEGLIGENT HOMICIDE."

III. "THE TRIAL COURT'S FAILURE TO GIVE THE JURY INSTRUCTION FOR NEGLIGENT HOMICIDE WAS 'PLAIN ERROR.'"

In his first and third assignments of error, Smith claims that the trial court erred when it failed to give a jury instruction on negligent homicide.

At the conclusion of Smith's case-in-chief, Smith's counsel requested an instruction on negligent homicide, arguing that it was a lesser included offense of reckless homicide and murder and that the evidence supported a finding that Smith had acted negligently at the time of the shooting. Citing *State v. Koss* (1990), 49 Ohio St.3d 213, 551 N.E.2d 970, the trial court concluded that negligent homicide was not a lesser included offense of murder because negligent homicide "requires the additional element of negligently causing the death by means of a deadly weapon." The trial court applied the same reasoning to reckless homicide, noting that reckless homicide is identical to murder with the exception that murder requires purposefulness while reckless homicide requires recklessness.

On appeal, Smith again asserts that negligent homicide is a lesser included offense of reckless homicide and that the evidence presented at trial was consistent with negligent homicide. Smith further argues that the trial court erroneously concluded that negligence is an "additional element" to be proven because "recklessly" and negligently are not distinct and exclusive elements."

Smith misconstrues the trial court's ruling on his request for an instruction on negligent homicide. The trial court did not deny Smith's request on the ground that negligence and recklessness were exclusive and distinct. Rather, it noted that negligent homicide requires the additional element of negligently causing the death *by means of a deadly weapon*. We find no fault with the trial court's ruling.

"A trial court must fully and completely give all instructions relevant and necessary for the jury to weigh the evidence and discharge its duty as the fact-finder. *State v. Comen* (1990), 50 Ohio St.3d 206, 553 N.E.2d 640. If under any reasonable view of the evidence, it is possible to find the defendant not guilty of a greater offense with which he is charged

and guilty of a lesser offense, the instruction on the lesser offense must be given. *State v. Wengatz* (1984), 14 Ohio App.3d 316, 471 N.E.2d 185. Where the evidence in a criminal case would support a finding by the jury of guilt of a lesser offense included in the offense for which the Defendant was tried, it is prejudicial error for the trial court to refuse a defense request to instruct on the lesser offense. *State v. Parra* (1980), 61 Ohio St.2d 236, 400 N.E.2d 885." *State v. Young*, Montgomery App. No. 19328, 2003-Ohio-1254, ¶9.

"An offense may be a lesser included offense of another if (i) the offense carries a lesser penalty than the other; (ii) the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and (iii) some element of the greater offense is not required to prove the commission of the lesser offense." *State v. Deem* (1988), 40 Ohio St.3d 205, 533 N.E.2d 294, paragraph three of the syllabus.

Here, Smith was not entitled to a jury instruction on negligent homicide, because that offense is not a lesser included offense of either murder or reckless homicide.

R.C. 2903.02(A), which defines murder, provides: "No person shall purposely cause the death of another or the unlawful termination of another's pregnancy."

R.C. 2903.041, which defines reckless homicide, is identical to R.C. 2903.02(A), with the exception that it requires that "[n]o person shall *recklessly* cause the death of another or the unlawful termination of another's pregnancy." (Emphasis added).

In contrast, R.C. 2903.05, which sets forth the elements of negligent homicide, provides: "No person shall negligently cause the death of another or the unlawful termination of another's pregnancy by means of a deadly weapon or dangerous ordnance as defined in section 2923.11 of the Revised Code."

Viewing the offenses as statutorily defined, an offender can commit murder and reckless homicide without committing negligent homicide. Specifically, a person can purposely or recklessly cause the death of another by means other than by a deadly weapon or dangerous ordnance. See *Koss*, 49 Ohio St.3d at 219. Consequently, negligent homicide is not a lesser included offense of murder or reckless homicide. *Id.*, *State v. Florence*, Montgomery App. No. 20439, 2005-Ohio-4508, ¶157. Accordingly, the trial court did not commit error – plain or otherwise – when it refused to give a jury instruction on negligent homicide in this case. See also *State v. Smith*, Montgomery App. No. 21004, 2006-Ohio-4405 (no instruction on negligent homicide is required when the theory of the defense for murder charge is predicated on accident).

The first and third assignments of error are overruled.

II. "APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO PRESERVE HIS OBJECTION TO JURY INSTRUCTIONS PER OHIO RULE OF CRIMINAL PROCEDURE 31(C)."

IV. "APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL COUNSEL FAILED TO PLEAD OR ARGUE SELF-DEFENSE HEREIN."

In his second and fourth assignments of error, Smith claims that his trial counsel rendered ineffective assistance by failing to preserve his objection to the trial court's refusal to instruct on negligent homicide. He further asserts that his trial counsel was ineffective in failing to argue self-defense.

In order to demonstrate ineffective assistance of counsel, Smith must establish that his counsel's representation fell below an objective standard of reasonableness and that he has been prejudiced by his counsel's deficient performance. *Strickland v. Washington*

Moreover, although Smith's version of the events of November 26 varied, he repeatedly asserted that he had the gun as a deterrent and that he had shot Spears accidentally. He contended that he did not shoot her purposefully. Indeed, on appeal, Smith states that "the evidence herein does not indicate that Smith purposefully used deadly force. Rather, Smith arguably brandished a firearm (deadly force) as a deterrent ... a means of 'ejecting' a trespasser. The fact that the firearm was discharged was due to accident or negligence."

In light of the evidence, Smith's trial counsel pursued a reasonable trial strategy when he argued that the shooting had been accidental rather than based on self-defense. We see no basis for second-guessing his counsel's decision. To the contrary, the record reveals that Smith's counsel presented an admirable defense under the circumstances. Counsel was not ineffective in failing to argue self-defense rather than that the shooting was accidental.

The second and fourth assignments of error are overruled.

The judgment of the trial court will be affirmed.

.....

FAIN, J. and DONOVAN, J., concur.

Copies mailed to:

Elizabeth A. Ellis
J. Allen Wilmes
Hon. Stephen A. Wolaver

IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

STATE OF OHIO

:

Plaintiff-Appellee

:

C.A. CASE NO. 2006 CA 68

v.

:

T.C. NO. 2005 CR 924

KYLE J. SMITH

:

FINAL ENTRY

Defendant-Appellant

:

:

.....

Pursuant to the opinion of this court rendered on the 15th day of
June, 2007, the judgment is affirmed.

Costs to be paid as stated in App.R. 24.


WILLIAM H. WOLFF, JR., Presiding Judge


MIKE FAIN, Judge


MARY E. DONOVAN, Judge

Copies mailed to:

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Common Pleas Court
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Xenia, Ohio 45385**

Not Reported in N.E.2d, 1987 WL 26339 (Ohio App. 4 Dist.)
Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Fourth District, Meigs County.

STATE of Ohio, Plaintiff-Appellee,

v.

Joseph C. **TAYLOR**, Defendant-Appellant.

No. 381.

Dec. 4, 1987.

Herman A. Carson, Athens, for appellant.

Fred W. Crow, Prosecuting Attorney, Pomeroy, for appellee.

DECISION & JUDGMENT ENTRY

GREY, Judge.

*1 This is an appeal of a jury verdict rendered in the Meigs County Common Pleas Court. The jury found Joseph Taylor guilty of murder in violation of R.C. 2903.02, a lesser included offense of aggravated murder with a firearm specification pursuant to R.C. 2929.71. We reverse.

The record contains the following facts. On July 21, 1985 Joseph **Taylor** shot his wife, Marilyn Timmons **Taylor**, in the neck. This shooting was witnessed by the **Taylor's**' 13 year old son, Joey, and by Marilyn's brother, Terry Timmons. Marilyn **Taylor** was transported to Veteran's Memorial Hospital in Pomeroy, and died shortly thereafter.

Joseph **Taylor** was arrested within a few hours by Marshal Alfred Lyons of Racine, at the request of Meigs County Sheriff Howard Frank. Lyons transported **Taylor** to the Meigs County Sheriff's office where he was immediately incarcerated. Frank ordered an intoxilyzer test administered to **Taylor**. The test result was .224. On July 21, 1985, as a result of an investigation by Frank's office, **Taylor** was charged with murder in violation of R.C. 2903.02. On July 29, 1985, **Taylor** was indicted by the Meigs County Grand Jury on one count of aggravated murder in violation of R.C. 2903.01(A) with a firearm specification. Joey **Taylor** and Terry Timmons both testified before the grand jury about the shooting of Marilyn **Taylor**.

The matter proceeded to trial before a jury on December 2, 1985. At the close of the **State's** evidence, **Taylor** moved for acquittal on the charge of aggravated murder. This motion was denied. **Taylor** renewed his motion for acquittal at the close of all of the evidence. The motion was again denied.

Before the jury was charged, **Taylor** requested the trial court to use his proposed jury instructions. These proposed instructions included an instruction on the lesser included offenses of murder, involuntary manslaughter and negligent homicide. The trial court refused to instruct the jury on the lesser offenses of involuntary manslaughter or negligent homicide, and instructed the jury only on the offenses of aggravated murder and murder.

The jury found Taylor guilty of the lesser offense of murder with a firearm specification. Taylor was sentenced to an indefinite term of 15 years to life for the murder conviction and an additional 3 year term for the firearm specification.

From this conviction and sentence, Taylor appeals and assigns three errors.

FIRST ASSIGNMENT OF ERROR:

"The trial court erred in sentencing defendant to be imprisoned for a three-year term of actual incarceration for having a firearm on or about his person or under his control during the commission of the unindicted offense of murder."

Taylor asserts that the trial court erred by sentencing him to a 3 year term of actual incarceration under R.C. 2929.71. We disagree.

Taylor contends that he was convicted on the charge of murder, rather than aggravated murder.

Taylor argues that since the firearm specification was included only in the indictment for aggravated murder, a conviction on the lesser included offense does not include a firearm specification. We are not persuaded by **Taylor's** argument.

*2 **Taylor** relies heavily on the Eighth District case, **State v. Loines** (1984), 20 Ohio App.3d 69. In **Loines** the Eighth District Court held:

"A trial court has no authority to impose the three year additional sentence mandated by R.C. 2929.71 where the indictment charging the defendant * * * did not contain a specification." *Id.* at 71. We find Taylor's reliance is misplaced. While the holding in *Loines*, supra, clearly states the law of Ohio, it is not applicable to the case before this court. Here, the indictment under which Taylor was charged and convicted *did* contain a firearm specification. The three year additional sentence mandated by R.C. 2929.71 was correctly imposed by the trial court.

R.C. 2941.141(A) states:

"Imposition of a term of actual incarceration upon an offender under Division (A) of Section 2929.71 of the Revised Code for having a firearm on or about his person or under his control while committing a felony is precluded unless the indictment, count in the indictment, or information charging the offense specifies that the offender did have a firearm on or about his person or under his control while committing the offense * * * "

The indictment which charged Taylor with aggravated murder contained the firearm specification pursuant to R.C. 2929.71. Taylor was convicted, *under the indictment*, of murder, a lesser included offense of aggravated murder. Taylor's murder conviction also included the firearm specification found by the jury. Since that specification was part of the original indictment, there is no conflict with *Loines*. The three year term of actual incarceration imposed by the trial court is valid. Taylor's first assignment of error is without merit and is overruled.

SECOND ASSIGNMENT OF ERROR:

"The trial court erred in permitting the State to introduce evidence of prior acts of the defendant with respect to discharging of firearms and alleged incidents of physical violence against the decedent." Taylor contends that evidence of prior acts involving firearms and physical violence were admitted by the trial court in error. We agree.

Evid.R. 404(B) states:

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation plan, knowledge, identity, or absence of mistake or accident."

This rule is clarified in *State v. Mann* (1985), 19 Ohio St.3d 34. In *Mann*, the Ohio Supreme Court stated:

"Prosecution evidence that a defendant has committed other crimes, wrongs or acts independent of the offense for which he is on trial is not generally admissible to demonstrate that the defendant has a propensity for crime or that his character is in conformity with other acts."

See generally, *State v. Burson* (1974), 38 Ohio St.2d 157 and *State v. Curry* (1976), 43 Ohio St.2d 66. Usually "other acts" evidence is admitted to establish one of the essential elements of a crime. In determining if the "other acts" evidence is admissible, one must look at that element of the charged offense for which the evidence is offered. Often such "other acts" evidence is offered to prove the identity, mens rea, or corpus delicti of a criminal act. If "other acts" evidence is not offered to prove one of the essential elements of a crime, such evidence is inadmissible.

*3 Most important in any determination of the admissibility of "other acts" evidence is its relevancy. Evid.R. 402 provides that relevant evidence is generally admissible. However, Evid.R. 403, excludes relevant evidence if its probative value is substantially outweighed by its undue prejudice toward the defendant.

The Ohio Supreme Court has held that to outweigh the possibility of prejudice, the relevancy of the "other acts" must be substantial. *State v. Lytle* (1976), 48 Ohio St.2d 391.

Here, the prosecution contends that the evidence of Taylor's physical violence toward his wife and his random discharge of a firearm inside his trailer was offered to negate the defense's contention that the shooting of Marilyn Timmons Taylor was an accident or mistake. The prosecution relies on the section of Evid.R. 404(B) which states that "other acts" evidence is admissible if it shows the absence of mistake or accident. We find the prosecution's reliance misplaced.

Prior to the testimony of Joey Taylor and Terry Timmons, no evidence was presented that the shooting was an accident or mistake. While appellant's attorney may have claimed accident or mistake in his opening statement, an opening statement is not evidence. Thus, at the time such "other acts" evidence was presented, no evidence had been presented to rebut. Evidence of the absence of mistake or accident is most generally presented on rebuttal rather than in the case in chief. The prejudicial nature of the testimony is plain. Such prejudice far outweighed the probative value of the "other acts" evidence, in the opinion of this writer. See the end of this opinion for a decision on assignment of error two.

THIRD ASSIGNMENT OF ERROR:

"The trial court erred in refusing to grant defendant's requested jury instructions on the lesser offenses of involuntary manslaughter, premised upon the misdemeanor of possession of a firearm while under the influence of alcohol, and/or negligent homicide."

Taylor asserts that the trial court erred in its failure to give his requested jury instructions on involuntary manslaughter and negligent homicide. We agree. When the evidence in a criminal case would support a finding by the jury of guilt of a lesser included offense for which the defendant was indicted and tried, the trial court must charge the jury on a lesser included offense. *State v. Loudermill* (1965), 2 Ohio St.2d 79. In *State v. Johnson* (1983), 6 Ohio St.3d 420, reversed and remanded on other grounds 467 U.S. 493, the Ohio Supreme Court held that involuntary manslaughter is a lesser included offense of murder. See also, *State v. Rohdes* (1986), 23 Ohio St.3d 225.

A careful reading of the record indicates that the evidence presented could have supported a jury finding of involuntary manslaughter. The trial court erred in not giving the instruction on involuntary manslaughter.

With regard to the negligent homicide instruction, current Ohio case law is unsettled as to whether or not negligent homicide is a lesser included offense of murder. The initial case in this line is *State v. Grace* (1976), 50 Ohio App.2d 259. In *Grace*, the Sixth District Court of Appeals, in analyzing the appropriateness of an instruction in negligent homicide under a charge of murder, stated in *dicta* that "[T]he probability that negligent homicide would ever be a lesser included offense of murder is slight." *Id.* at 261.

*4 In *State v. Brewer* (July 31, 1978), Lake Co.App. No. 6-144, unreported, the Eleventh District Court of Appeals found that defending Brewer requested an instruction on negligent homicide, but made the request after the trial court had concluded its instructions to the jury. The request was held untimely under Crim.R. 30. However, the appellate court made a holding, as follows:

"Regardless of the timeliness of the request for a jury instruction on negligent homicide, the trial court did not abuse its discretion in refusing to give said instruction because negligent homicide is not an included offense of murder."

The *Brewer* court correctly identified the statutory elements of murder, R.C. 2903.02, as (a) purpose; (b) causation and (c) death of another. Similarly, the statutory elements of negligent homicide, R.C. 2903.05, were identified as (a) negligence; (b) causation; (c) death of another and (d) by means of a deadly weapon or dangerous ordnance. However, the *Brewer* court then incorrectly applied the "element test", merely overlaying the elements for negligent homicide over those for murder and concluding:

"Obviously the crime of negligent homicide contains the elements 'negligently' and 'use of a deadly weapon or dangerous ordnance' which are not elements of the offense of murder. The rule of *Hreno and Kuchmack* requires the conclusion negligent homicide is not an included offense of murder." *Id.*

The determination of a lesser included offense requires more than this "identifies" test, as we discuss further below. In the federal habeas review of Brewer's conviction, the United States Sixth Circuit Court of Appeals affirmed solely on the Crim.R. 30 grounds, never reaching the lesser included offense issue. *Brewer v. Overberg* (1980), 624 F.2d 51.

In *State v. Williams* (1981), 2 Ohio App.3d 289, the Ninth District Court of Appeals distinguished the case before it from *Grace* and held that instructions to the jury on self defense and negligent homicide while incompatible, may be, under certain circumstances, appropriate. The *Williams* court was not faced with the issue of negligent homicide as a lesser included offense of murder.

In *State v. Jenkins* (1983), 13 Ohio App.3d 122, the First District Court of Appeals stated in its syllabus:

"Negligent homicide (R.C. 2903.05) is not a lesser included offense of murder (R.C. 2903.02), regardless of whether the offense is in fact committed with a deadly weapon."

In support of this holding, the *Jenkins* court cites *Brewer*. But *Brewer* was decided solely on procedural grounds, and did not decide if negligent homicide was a lesser included offense of murder. Finally, in *State v. King* (1984), 20 Ohio App.3d 62, the First District Court of Appeals was again confronted with the question of whether negligent homicide was a lesser offense of murder. The court retreated from the authoritative stand taken in *Jenkins*, supra. The court's discussion was couched in possibilities as evidenced by the following language:

*5 "To determine whether the defendant was entitled to an instruction on negligent homicide, a court must first determine whether it is a lesser included offense of murder. If that question be answered in

the affirmative, then, as a second question, it must be determined if the facts as developed by the evidence at trial, considered in a light most favorable to the defendant, were such that a jury could reasonably find the defendant not guilty of the charged offense but guilty of the lesser included offense. (citation omitted)

Assuming, arguendo, that negligent homicide is a lesser included offense of murder, we find that the trier of fact could not reasonably have found the defendant not guilty of murder but guilty of negligent homicide."

The *King* court refused to repeat its prior holding in *Jenkins*, supra.

In light of the decisions in *State v. Jenkins*, supra and *State v. Brewer*, supra, the question is still an open one. We hold that negligent homicide is a lesser included offense of murder and that the Ohio legislature intended it to be as such.

It is a hallmark of civilized law that proscribed conduct is not criminal unless the actor has the required guilty state of mind, or *mens rea*. The current Ohio Criminal Code, effective January 1, 1974, defines all crimes in terms of proscribed action and requisite culpability. R.C. 2901.21(A). At first blush, and applying the test used by the Eleventh District in *Brewer*, negligent homicide may appear to fall short as a lesser included offense of murder on both counts: culpability and proscribed action. A closer examination, however, reveals that negligent homicide, under the facts presented here, is a lesser included offense of murder.

CULPABILITY

Prior to 1974, Ohio law contained a plethora of terms to describe mental states: purposely, deliberately, maliciously, voluntarily, willfully, intentionally, wantonly, corruptly, knowingly and negligently. See Ohio Legislative Service Commission, *Proposed Ohio Criminal Code* (March, 1971), page x. The new code condensed all of these into four separate degrees of culpability: purpose, knowledge, recklessness, and negligence. R.C. 2901.22. These mental states describe a continuum of culpability from deliberate, purposeful acts to careless, negligent acts.

Revised Code 2901.22(D) provides:

"A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances may exist."

Negligence is based on inadvertence to risk, and criminal negligence requires a substantial lapse from due care in a given set of circumstances.

Negligent homicide did not exist in Ohio prior to 1974, nor did it exist in any state prior to the drafting of the Model Penal Code in 1959. 2, American Law Institute, *Model Penal Code and Commentaries*, § 210.4, comment 2. At common-law, involuntary manslaughter was a catch-all offense. It encompassed conduct was not the "depraved heart of murder, but that was sufficiently reckless or negligent to constitute culpability greater than that for ordinary civil negligence. *Model Penal Code*, supra, § 210.3, comment 1. See, *State v. McDaniel* (1956), 103 Ohio App. 163; appeal dismissed, 166 Ohio St. 378. In England for example, inattention to risk would suffice for a conviction of manslaughter, *Regina v. Benge* (1865), 176 Eng.Rep. 665, or even murder, if the risk of harm was great enough, *Regina v. Ward* (1956), 1 Q.B. 351, at 356:

*6 " * * * but if the jury come to the conclusion that any reasonable person, that is to say, a person who cannot set up a plea of insanity, must have known that what he was doing would cause at least grievous bodily harm, and the death is the result of that grievous bodily harm, then that amounts to murder in law and a verdict of murder is justified."

We also note with approval the words of Oliver Wendell Holmes in *Commonwealth v. Pierce* (1884), 138 Mass. 165, at 178:

"But it is familiar law that an act causing death may be murder, manslaughter, or misadventure, according to the degree of danger attending it. If the danger is very great, as in the case of an assault with a weapon found by the jury to be deadly, or an assault with hands and feet upon a woman known to be exhausted by illness, it is murder."

By including negligent homicide in the code, the legislature intended to reach this kind of culpability. Thus, if the proof of purposeful killing might reasonably fail, an instruction on negligent homicide should be given where the proof might reasonably establish that death was negligently caused by use of a deadly weapon or dangerous ordnance. Proof of intoxication for example, might show lack of purpose but it also might reasonably establish negligent inadvertence to risk. In any event, to say that negligent homicide is not a lesser included offense of murder solely because murder requires purposefulness while negligent homicide requires the lesser culpability of negligence is to defeat the

whole purpose of the criminal code to impose penalties for culpable acts.

Finally, as further evidence of the legislature's intent to establish a continuum of culpability and thereby create "included offenses" when the prohibited acts are the same, we note R.C. 2901.22(E): "When the section defining an offense provides that negligence suffices to establish an element thereof, then recklessness, knowledge, or purpose is also sufficient culpability for such element. When recklessness suffices to establish an element of an offense, then knowledge or purpose is also sufficient culpability for such element. When knowledge suffices to establish an element of an offense, then purpose is also sufficient culpability for such element."

PROHIBITED ACTS

Keeping in mind that sections of the Revised Code defining offenses must be strictly construed against the state, R.C. 2901.04(A), we look again to the definitions of murder and negligent homicide. As is the case of murder and involuntary manslaughter, "the common element shared by these two offenses is the causing of death of another with the only distinguishing factor being the mental state involved in that act." *State v. Johnson* (1983), 6 Ohio St.3d 420, 424; rev'd on other grounds, *Ohio v. Johnson* (1984), 467 U.S. 493.

Negligent homicide is more narrowly defined than is murder; the victim must be killed by a particular means, i.e., with "a deadly weapon or dangerous ordnance." Murder is simply purposeful killing, implicitly by *any* means. Thus, killing with a deadly weapon or dangerous ordnance could be either negligent homicide or murder (or manslaughter), depending on the mental state of the killer. Killing by any other means, such as poisoning or pushing the victim off a cliff, can never be negligent homicide, only murder. This conclusion is valid even if the shove off the cliff resulted from a substantial lapse of due care, or gross negligence.

*7 Since the criminal code was completely revised, the courts have had great difficulty in dealing with what is a lesser included offense. In *State v. Merriweather* (1980), 64 Ohio St.2d 57, the Ohio Supreme Court, using the common-law elements test, found that robbery is not a lesser included offense of aggravated robbery. This is an anomalous result, and even the justices in *Merriweather* found it to be so. The anomaly, they said, arose out of the language of the statute which the Supreme Court had no authority to amend.

"It is argued that the General Assembly intended to carry forth the scheme of robbery to be a lesser included offense of aggravated robbery, as was found in our interpretation of the prior Criminal Code which held robbery to be a lesser included offense of armed robbery.

The General Assembly may have attempted to carry out such a scheme, and the Legislative Comments would so indicate, but to so hold here would be contrary to the language specifically by the General Assembly." Justice Holmes, concurring opinion.

We do not believe this was a failure in the language of the legislature, but a misapplication of the common law elements tests. At common law, crimes were graduated. Crimes were composed of elements, and the more elements, the more serious the offense, like steps on a staircase. Theft was theft, but beyond a certain value it was grand theft. Add the element of threat or force, and you have robbery, and so on. Under the common law elements system, a lesser included offense had one less element, was one step lower on the staircase. Since the crimes themselves were an aggregation of elements, the lesser included offenses were aggregations of fewer elements.

With the adoption of the criminal code by the legislature in 1974, the elements test will no longer work because the legislature has changed the way criminal responsibility is assessed. The intent of the criminal code is to divide the crimes into categories defined by the interest of society to be protected, e.g. 2903. Homicide and Assault, 2905. Kidnaping and Extortion, 2907. Sex Offenses, and so on.

Within each chapter is a series of offenses, each one having a lesser degree of criminal responsibility. These offenses do not follow the concept of common law elements. It is inappropriate, therefore, to use the common law elements test in deciding what is a lesser included offense. *Merriweather*, supra, can demonstrate.

In *Merriweather*, the court held that aggravated robbery is made up of two elements, theft plus possession of a deadly weapon. Robbery also has two, theft plus the use of force. Since possession of a deadly weapon is not the same as force, the court held that the elements were not the same, and thus robbery was not a lesser included offense of aggravated robbery.

A better way of viewing what the legislature intended is to view the criminal code as a continuum of declining culpability. The legislature clearly intended to make the use of deadly weapons a most culpable act. The most serious theft offense is one done while in possession of a gun, whether it is used or not. Shoplifting with a gun in your pocket is aggravated robbery.

***8** The intent of the legislature was not to define crimes in terms of the elements of the offenses, but in terms of the degree of culpability and the interest of society to be protected.

Using this analysis we turn to the case before us. Defendant Taylor was charged with violation of R.C. 2903.02, Murder. This section is included in the code section entitled "Homicide," which has the following list of crimes. 2903.01 Aggravated Murder; 2903.02 Murder; 2903.03 Voluntary Manslaughter; 2903.04 Involuntary Manslaughter; 2903.05 Negligent Homicide; 2903.06 Aggravated Vehicular Homicide; 2903.07 Vehicular Homicide.

A striking characteristic of the code sections is that there is a single societal interest to be protected, and a series of declining degrees of responsibility and punishment. Each section prohibits causing the death of another, and each has lesser degrees of culpability. The "elements" of the offenses as that term was used at common law, are not applied. Negligent homicide, R.C. 2903.05, which proscribes causing death by the careless use of a deadly weapon, is entirely new. The inclusion of this section, a creation of this new offense as a kind of homicide, indicates a clear legislative intent to emphasize not the "elements" of crime, but the idea that the degree of the crime and its lesser included offenses depend on the degree of culpability.

R.C. 2945.74 requires a two-step process before a lesser offense instruction is given the jury. *Merriweather*, supra, at 58. First, it must be determined whether the offense is, by the language of the code itself, lesser and included. The legislature of this state has provided a workable test to make this determination. We have attempted to do so here. The "elements test" announced in *State v. Hreno* (1954), 162 Ohio St. 193, no longer provides any useful guidance when considering crimes defined according to degrees of culpability, as they are under the 1974 Criminal Code. Of course, even if the offense is lesser and included, an instruction will not be given unless the evidence presented at trial would allow a jury to reasonably find the defendant guilty of the lesser offense, but not guilty of the charged offense. See *State v. King*, supra, at 64. We find the evidence in this case could support a finding of negligent homicide by the jury. The trial court erred in its exclusion of such an instruction.

The prosecution asserts that Taylor failed to raise an objection to the trial court's instruction and therefore, he is precluded from raising this assignment of error on appeal. We disagree.

A liberal reading of Crim.R. 51 as well as a thorough reading of the trial transcript indicates that when the trial court ruled on Taylor's motion for the jury instructions on negligent homicide and involuntary manslaughter, an exception arose which preserved the matter for appeal to this court. Thus, this assignment of error is properly before this court. Taylor's third assignment of error is well taken and is sustained.

***9** In light of the opinion of Stephenson, J., concurring in part and dissenting in part, and the dissent of Abele, J., assignment of error two is overruled.

JUDGMENT REVERSED AND REMANDED.

STEPHENSON, J. concurs in part and dissents in part, with attached opinion;

ABELE, J., dissents.

STEPHENSON, Judge, concurring in part and dissenting in part:

I concur in the overruling of appellant's first assignment of error, the sustaining of appellant's third assignment of error, and reversal of the judgment of conviction and sentence and remand to the court below for a new trial. However, I dissent as to the sustaining of appellant's second assignment of error.

Appellant's second assignment of error asserts that the trial court erred in permitting appellee to introduce evidence of appellant with respect to discharging of firearms and alleged incidents of physical violence against the decedent. At trial, upon the direct examination of appellee's first witness, appellant's son, Joe Taylor, the trial court, over objection of appellant, allowed testimony as to appellant previously discharging the gun inside the marital domicile and appellant previously slapping the decedent during arguments.

The majority opinion in sustaining appellant's second assignment of error states that if " 'other acts' evidence is not offered to prove one of the essential elements of a crime, such evidence is inadmissible". However, Evid.R. 404(B) provides as follows:

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in

order to show that he acted in conformity therewith. *It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.*" (Emphasis added)

Motive, opportunity, preparation, plan, knowledge, identity, or absence of mistake or accident are not necessarily "essential elements of a crime", yet contrary to the majority opinion's statement, this does not preclude proof of such factors pursuant to Evid.R. 404(B). Evidence of other acts of a defendant is admissible only when it tends to show one of the matters enumerated in the rule and when it is relevant to the offense in question. *State v. DeMarco* (1987), 31 Ohio St.3d 191, 194; see also R.C. 2945.59.

The majority opinion in sustaining appellant's second assignment of error appears to hold that until evidence is presented by the defendant that brings into question whether the defendant herein acted by mistake or accident, appellee could not introduce evidence of other acts in an attempt to prove absence of mistake or accident. Such holding would limit appellee's introduction of such evidence only in either rebuttal or redirect examination and not in its case in chief.

Evidence of other acts of a criminal defendant is admissible only if one or more of the matters enumerated in the statute is a "material issue at trial" and only if such evidence tends to show the material enumerated matter. See, e.g. *State v. Curry* (1975), 43 Ohio St.2d 66, syllabus; *State v. Snowden* (1976), 49 Ohio App.2d 7. The position taken by the majority opinion limits the raising of a "material issue at trial" to evidence adduced at trial. However, neither Evid.R. 404(B), R.C. 2945.59, nor pertinent case law follows such limitation. In *Snowden*, supra at p. 15-16, the court stated, in pertinent part, as follows:

***10** "Finally, we think it appropriate to comment on the method used by the state in attempting to adduce evidence of the other acts in question, since we conclude that it contains, at the least, an inherent potential for prejudice. It seems clear from our analysis of R.C. 2945.59 that it may fairly be characterized as a defensive, or perhaps more accurately as a *counter offense* weapon in the arsenal of the prosecutor. With the exception of those cases where the other acts are so inextricably interwoven, temporally and circumstantially, with the charged crime that it would not be feasible to demonstrate the latter without evidence of the former, it is apparent that the admissibility of other acts evidence will depend upon the nature of the defense offered. Frequently and perhaps usually this will manifest itself only after the defendant has undertaken his defense, and is doubtless why nearly all of the cases involving this statute that we have had occasion to decide have involved the use of evidence of other acts as *rebuttal* evidence offered by the state after the defense rested. *This seems to us its proper role, and that having the least possibility of prejudice, although we do not wish, nor is it necessary for the purposes of this appeal, to rule out its use by the state in chief, where the defense is alibi or affirmative in nature and clearly manifested (e.g., by discovery techniques) before any evidence is adduced.*" (Emphasis added)

Where such "clear manifestation" of a "material issue" is present prior to evidence being adduced, other acts evidence can be used by the prosecution in its case in chief. *Palmer*, Ohio Courtroom Evidence (1986), Character Evidence, p. 77. Generally, it is prudent to give the defense specific adequate pretrial notice and to advise the court if such other act evidence is to be used by the state in its case in chief. *Palmer*, supra; See also *State v. Smith* (1977), 59 Ohio App.2d 194.

Here, although neither appellant nor the prosecuting attorney ordered the transcription of the opening arguments at trial for inclusion in the record herein, the record still clearly manifests that appellant raised the issue of accident or mistake during his opening argument by the following colloquy regarding the admission of other acts evidence:

"Mr. Toy: Judge, it is our position that if accident were an issue in this case and *it's now an issue because of the opening statement* (inaudible), this would not be allowed to go into but since it has been talked about and you can show pursuant to this section that indeed this was not an accident. I think this has a relevancy as anything intending to prove an issue in trial. *As Mr. Carson has indicated, it is up to us to show the burden rather than an accident.* If we are not allowed to bring this in, we are going to have very much difficulty doing so.

* * *

The direction of the question would ... that we intend to ask would be this. Had he ever seen any violence done by his father towards his mother, which I think goes into the question of the accident. Okay. Now he is going to testify that he seen his dad slap his mother on prior occasions. I think that is something that can go, *if they are bringing up accident, he brought it up by putting it in his opening statement.* That is something we can bring before the jury that indeed, he does have tendency to commit violent acts, shooting the gun in the trailer, slapping ... I think this all goes with some type of

anger. I think it is relevant ..." (Emphasis added)

*11 Accordingly, in that no applicable law requires that a "material issue" pursuant to Evid.R. 404(B) be raised solely by evidence rather than argument and that the jury was aware of appellant's defense and presumably reviewed the state's evidence in light of such claim, the trial court did not violate such evidentiary rule by admitting the evidence where the material issue was raised by appellant's opening argument.

Another position apparently taken by the majority opinion is that the prejudicial nature of the "other acts" evidence substantially outweighed its probative value. Evid.R. 403. The admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus. Part of the trial court's consideration in deciding whether to exclude evidence under Evid.R. 403 should include an evaluation of the availability and effectiveness of a limiting instruction under Evid.R. 105. 1 Weissenberger, Ohio Evidence (1985), Section 105.3.

The trial court instructed the jury, in pertinent part, as follows:

"Now if you find from other evidence that the Defendant did commit the act, with which he is now charged, if needed, you may consider evidence of other acts to determine the absence of mistake or an accident of the Defendant in this case. Evidence of other acts may not be considered as any proof whatsoever that the Defendant did any act alleged in this indictment in this case."

In that such other acts evidence was relevant to the issue of appellant's intent or purpose to commit the crime charged in the indictment, murder, and to negate appellant's argument that the death was caused by accident, and the trial court properly limited such other acts evidence to the purposes specified in Evid.R. 404(B) through its jury instruction, the trial court's admission of such evidence did not constitute an abuse of discretion. We further note that the majority opinion gives no effect to the trial court's limiting instruction. For the foregoing reasons, I would overrule appellant's second assignment of error.

With respect to appellant's third assignment of error asserting that the trial court erred in refusing to grant appellant's requested jury instructions on the lesser included offenses of involuntary manslaughter and negligent homicide, I would sustain the same for the following reasons. The pertinent statutory provisions provide as follows:

"R.C. 2903.02 Murder

(A) No person shall purposely cause the death of another."

"R.C. 2903.04 Involuntary Manslaughter

(A) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a felony.

(B) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a misdemeanor."

"R.C. 2903.05 Negligent Homicide

(A) No person shall negligently cause the death of another by means of a deadly weapon or dangerous ordnance as defined in section 2923.11 of the Revised Code."

*12 An offense is a lesser included offense where all the elements of such offense are present with others in the offense charged in an indictment. *State v. Hreno* (1954), 162 Ohio St. 193, paragraph two of the syllabus; *State v. Rohdes* (1986), 23 Ohio St.3d 225. If we were to adopt a strict *Hreno* elements test, it is apparent that negligent homicide would not constitute a lesser included offense of murder or aggravated murder in that either of the latter offenses can be committed without a deadly weapon or dangerous ordnance. See, e.g. *State v. Jenkins* (1983), 13 Ohio App.3d 122.

However, the Tenth District Court of Appeals in *State v. Banks* (1986), 31 Ohio App.3d 57, 62, [FN1] stated as follows:

FN1. A motion for leave to appeal *Banks* to the Supreme Court of Ohio was overruled.

"The state contends that the refusal to instruct on negligent homicide was correct because negligent homicide (R.C. 2903.05) contains an element not found in murder (R.C. 2903.02)--that death must be caused by a dangerous weapon or ordnance--citing *State v. Hreno* (1954), 162 Ohio St. 193, 55 O.O. 97, 122 N.E.2d 681. However, *Hreno* goes on to clarify that, 'if certain but not all the elements of the offense charged in the indictment constitute in themselves an offense, then such offense is a lesser included offense.' *Id.* at 197, 55 O.O. at 99, 122 N.E.2d at 683. Thus, even *Hreno* rejected the

overly technical approach taken by the state." [FN2]

FN2. Although I agree with the *Banks* holding under the circumstances herein, that court's attempt to distinguish *Hreno* on the basis of such language is open to question in that the alleged clarification in *Hreno* addresses situations where "certain" of the elements "in the indictment" constitute an offense in themselves and an indictment for aggravated murder need not include the deadly weapon or dangerous ordnance element necessary for the offense of negligent homicide, which indicates that not all the elements of such offense would necessarily be "in the indictment". In the instant case, it should be noted that a firearm specification was included in the July 29, 1985 indictment and thus, all the elements of negligent homicide were essentially in the indictment. Furthermore, even if *Jenkins* rather than *Banks* controlled so as to preclude an instruction on negligent homicide, there is sufficient evidence on the record as to the lesser included offense of involuntary manslaughter to require a reversal of appellant's conviction and sentence and a remand for further proceedings.

Accordingly, pursuant to *Banks*, negligent homicide may be a lesser included offense of murder and aggravated murder. As noted in the majority opinion, involuntary manslaughter has been explicitly held to be a lesser included offense of murder. *Rohdes*, supra. I disagree, however, with the opinion's broad rejection of the "elements" test. A position not adopted by the Supreme Court of Ohio nor, for that matter, even the *Banks* court. It should be noted that, in the case at bar, there is no argument by appellee that negligent homicide is not a lesser included offense of murder.

Rather, appellee's argument on appeal with respect to appellant's third assignment of error is limited to the lack of evidence at trial to justify the instructions requested on involuntary manslaughter and negligent homicide. Where the evidence in a criminal case would support a finding by the jury of guilt of a lesser included offense included in the offense for which defendant was indicted and tried, the refusal of the trial court to charge upon that lesser included offense is error prejudicial to the rights of defendant. *State v. Loudermill* (1965), 2 Ohio St.2d 79. If the trier of fact could reasonably find against the state and for the accused upon one or more of the elements of the crime charged and for the state and against the accused on the remaining elements, which by themselves would sustain a conviction upon a lesser included offense, then a charge on the lesser included offense is both warranted and required. *State v. Nolton* (1969), 19 Ohio St.2d 133; *State v. Sage* (1987), 31 Ohio St.3d 173. The Supreme Court of Ohio has stated as follows:

***13** "The persuasiveness of the evidence regarding the lesser included offense is irrelevant. If under any reasonable view of the evidence it is possible for the trier of fact to find the defendant not guilty of the greater offense and guilty of the lesser offense, the instruction on the lesser included offense must be given. The evidence must be considered in the light most favorable to defendant." *State v. Wilkins* (1980), 64 Ohio St.2d 382, 388; *Sage*, supra at p. 176.

Here, there was evidence that appellant had consumed a great deal of alcoholic beverages prior to the homicide, that appellant was staggering at the time of the incident, that the trigger spring on the gun was broken, and that the trigger pull on the gun was extremely light, i.e. only 3/4 of a pound. Although, admittedly, such evidence may be characterized as unpersuasive, when construed in a light most favorable to appellant, it provides a reasonable basis for a finding of either involuntary manslaughter or negligent homicide. Accordingly, I concur in the judgment sustaining appellant's third assignment of error, reversing the judgment of conviction and sentence, and remanding for further proceedings below.

Ohio App., 1987.

State v. Taylor

Not Reported in N.E.2d, 1987 WL 26339 (Ohio App. 4 Dist.)

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31 Ohio App.3d 57, 508 N.E.2d 986, 31 O.B.R. 97

Court of Appeals of Ohio, Tenth District, Franklin County.
The STATE of Ohio, Appellee,
v.
BANKS, Appellant. [FN*]

FN* A motion for leave to appeal to the Supreme Court of Ohio was overruled on July 23, 1986 (case No. 86-710).

No. 85AP-391.
April 22, 1986.

Defendant was convicted of murder, with a firearm specification, following trial in the Court of Common Pleas, Franklin County, and he appealed. The Court of Appeals held that: (1) prosecutor's comments suggesting that defense counsel did not believe in his own case but that prosecutor did believe in hers was reversible error; (2) testimony of prior acts of violence against defendant's wife was relevant to issue of intent or purpose in shooting of his wife, which he claimed was accidental; and (3) under the evidence presented, the trial court was required to give instruction on negligent homicide as a lesser included offense of murder.

Reversed and remanded.

Strausbaugh, J. filed a dissenting opinion.

West Headnotes

[1] KeyCite this headnote

110 Criminal Law

110XX Trial

110XX(E) Arguments and Conduct of Counsel

110k726 k. Responsive Statements and Remarks.

Attorney could not properly fail to object to questionable or improper comments of opposing counsel so as to utilize them as a justification for an inaccurate and grossly improper comment at the conclusion of closing argument to jury.

[2] KeyCite this headnote

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1171 Arguments and Conduct of Counsel

110k1171.3 k. Comments on Evidence or Witnesses, or Matters Not Sustained by Evidence.

There was no reversible error with respect to misstatement of evidence in prosecutor's closing argument as to whether witness who testified as to telephone conversation with defendant had previously talked to defendant on the telephone so as to be able to recognize his voice, especially in the absence of objection.

[3] KeyCite this headnote

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1171 Arguments and Conduct of Counsel

110k1171.1 In General

110k1171.1(2) Statements as to Facts, Comments, and Arguments

110k1171.1(4) k. Comments on Defense Counsel.

Prosecutor's closing argument suggesting that defense counsel did not believe in his own case but that prosecutor did believe in hers was reversible error where objection thereto was overruled. Code of Prof.Resp., DR7-106(C).

[4] KeyCite this headnote

110 Criminal Law

110XVII Evidence

110XVII(F) Other Offenses

110k371 Acts Showing Intent or Malice or Motive

110k371(4) k. In Prosecutions for Homicide.

(Formerly 203k159)

Testimony of prior acts of violence against wife committed by defendant were relevant to issue of intent or purpose in prosecution for murder of defendant's wife where defendant admitted that he shot his wife but stated that he loved her and would never do anything to harm her or his unborn child. Rules of Evid., Rule 404(B); R.C. § 2945.59.

[5] KeyCite this headnote

110 Criminal Law

110XXIV Review

110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review

110XXIV(E)1 In General

110k1038 Instructions

110k1038.2 k. Failure to Instruct in General.

Failure to give special limiting instruction on prior acts evidence was not plain error.

[6] KeyCite this headnote

110 Criminal Law

110XX Trial

110XX(B) Course and Conduct of Trial in General

110k641 Counsel for Accused

110k641.13 Adequacy of Representation

110k641.13(2) Particular Cases and Problems

110k641.13(2.1) k. In General.

(Formerly 110k641.13(2))

Failure to request special limiting instruction on prior acts evidence did not constitute ineffective assistance of counsel. Rules Crim.Proc., Rules 30, 52(B); U.S.C.A. Const.Amend. 6.

[7] KeyCite this headnote

110 Criminal Law

110XVII Evidence

110XVII(L) Admissions

110k405 Admissions by Accused

110k406 In General

110k406(1) k. In General.

203 Homicide KeyCite this headnote

203IX Evidence

203IX(D) Admissibility in General

203k985 Intent, Malice, Deliberation, and Premeditation

203k989 Previous Threats and Expressions of Ill Will by Accused

203k989(4) k. Remoteness.

(Formerly 203k156(1))

203 Homicide KeyCite this headnote

203IX Evidence

203IX(D) Admissibility in General

203k1000 Motive

203k1005 k. Discord Between Spouses or Cohabitants.

(Formerly 203k156(1))

Defendant's alleged statement to sister-in-law to effect that he and his wife could not stay in the same room together and that he could kill wife and get away with it did not constitute an admission, but, though it occurred several months prior to shooting of defendant's wife, was properly admitted as evidence of defendant's state of mind and mental feeling, bearing on issues of motive and intent. Rules of Evid., Rule 803(3).

[8] KeyCite this headnote

110 Criminal Law

110XVII Evidence

110XVII(I) Competency in General

110k386 k. Nature and Source of Evidence.

Though foundation of defendant's identity as person who made telephone call to his sister-in-law, suggesting that he could kill his wife and get away with it, was weak, this went to the weight rather than admissibility of the evidence in murder prosecution.

[9] KeyCite this headnote

210 Indictment and Information

210XIII Included Offenses

210k191 Different Offense Included in Offense Charged

210k191(4) k. Charge of Homicide.

Under appropriate circumstances, negligent homicide is a lesser included offense of murder; disagreeing with State v. Jenkins, 13 Ohio App.3d 122, 13 O.B.R. 141, 468 N.E.2d 387. R.C. §§ 2903.02, 2903.05.

[10] KeyCite this headnote

210 Indictment and Information

210XIII Included Offenses

210k191 Different Offense Included in Offense Charged

210k191(.5) k. In General.
(Formerly 210k191)

When it would be possible for the same evidence to prove both a greater offense and a lesser offense depending solely on the culpable mental state of the accused, the lesser offense is a lesser included offense of the greater offense even though it might be possible in a different case to prove commission of the greater offense without proving the commission of the lesser.

[11] [KeyCite this headnote](#)

203 Homicide

203XII Instructions

203XII(C) Necessity of Instruction on Other Grade, Degree, or Classification of Offense

203k1457 k. Manslaughter.
(Formerly 203k309(6))

Instruction on negligent homicide as a lesser included offense of murder was required where it was uncontroverted that death was caused by deadly weapon and jury could have found against the state on the issue of whether the death was caused purposely, while finding for the state on the issue of defendant causing the death of the victim. R.C. §§ 2903.02, 2903.05.

[12] [KeyCite this headnote](#)

92 Constitutional Law

92XXVII Due Process

92XXVII(H) Criminal Law

92XXVII(H)6 Judgment and Sentence

92k4704 Matters Considered in Sentencing

92k4705 k. In General.

(Formerly 92k270(2))

350H Sentencing and Punishment [KeyCite this headnote](#)

350HI Punishment in General

350HI(A) In General

350Hk5 Constitutional, Statutory, and Regulatory Provisions

350Hk8 k. Validity.

(Formerly 110k1206.1(1))

Statute provides sufficient notice that additional term of years will be involved when a firearm is associated with a felony offense, and thus does not violate due process. R.C. § 2929.71; U.S.C.A. Const.Amend. 14.

[13] [KeyCite this headnote](#)

350H Sentencing and Punishment

350HVII Cruel and Unusual Punishment in General

350HVII(E) Excessiveness and Proportionality of Sentence

350Hk1509 Enhanced Punishment

350Hk1511 k. Firearms Enhancements.

(Formerly 110k1213.2(1))

Statute providing for additional term of years when firearm is associated with a felony offense does not constitute cruel and unusual punishment. R.C. § 2929.71; U.S.C.A. Const.Amend. 8.

[14] KeyCite this headnote

203 Homicide

203XI Questions of Law or Fact

203k1343 k. Accident or Misfortune.

(Formerly 203k280)

Evidence, which indicated that gun was fired twice, was sufficient for jury in prosecution of defendant for murder of his wife, despite contention that the shooting was accidental.

****988** Syllabus by the Court

- *58** 1. It is reversible error for a prosecutor to imply in closing argument that defense counsel did not believe in his own case, but that the prosecutor did believe in hers.
2. In a prosecution for murder where the defendant testifies that he would never do anything to harm his spouse or his unborn child, testimony of his prior acts of violence against the victim-spouse is admissible since the acts were relevant to the issues of intent or purpose and his capability of violent acts against his spouse. (Evid.R. 404[B].)
3. In most cases of negligent homicide, a charge of murder would also be appropriate since the degree of the offense would depend solely upon the culpable mental state of the defendant, that is, whether the killing was purposeful or negligent. Whether a lesser included offense is involved depends upon the evidence adduced at trial and cannot be determined solely by comparison of statutory language, which must be consulted to determine whether the lesser offense could be, rather than always is, included within the greater offense. In other words, where it would be possible for the same evidence to prove both a greater offense and a lesser offense depending solely upon the culpable mental state of the accused, the lesser offense is a lesser included offense of the greater offense even though it might be possible in a different case to prove commission of the greater offense without proving the commission of the lesser. State v. Loudermill (1965), 2 Ohio St.2d 79, 31 O.O.2d 60, 206 N.E.2d 198.
4. R.C. 2929.71 (additional three years of actual incarceration) provides sufficient notice that an additional term of years will be involved when a firearm is associated with a felony offense and, thus, does not violate due process of law.
- Michael Miller, Pros. Atty., and Karen L. Martin, Columbus, for appellee.
James Kura, County Public Defender, and Barbara J. Slutsky, Columbus, for appellant.

PER CURIAM.

Defendant-appellant appeals a decision of the Court of Common Pleas of Franklin County of guilty of murder with a firearm specification. Defendant was sentenced to a term of fifteen years to life, with an additional three years of actual incarceration for the firearm specification.

A jury trial adduced the following facts. Several police officers and a medic testified that they arrived at defendant's home and found defendant's wife lying on the floor, apparently shot; that defendant said he had accidentally shot his wife; and that he identified the gun involved.

Detectives testified that defendant changed his version of events several ****989** times. The victim's sister testified that defendant had told her, "from what I can see now, Jackie and I can't stay in the same room together. One of us has to go"; and that he told her he could kill the victim and get away with it.

An expert testified that the weapon had been discharged at a distance of four feet or less; that, when in half-cocked position, the gun would not discharge unless the trigger was pulled; and that if the gun fired, it would not fire a second time unless some agent

turned the cylinder.

***59** Two of defendant's friends testified that they had been in defendant's home earlier in the evening; that both defendant and his wife were happy and excited at the arrival of their baby in the near future; and that they saw no disagreement between the two. Defendant testified that the shooting was an accident; that his wife asked him to unload the gun and remove it from the room; that while doing so it accidentally discharged twice; and that he loved his wife and would not have done anything to harm either her or their unborn child.

Defendant asserts the following six assignments of error:

"1. Improper statements made by the prosecuting attorney during questioning of appellant and closing arguments denied appellant a fair trial and due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and, as such, it was error for the trial court to overrule appellant's motion for new trial in this regard.

"2-A. The trial court erred in overruling defense counsel's motion in limine and motion for judgment of acquittal concerning an alleged prior similar act and admitting such testimony into evidence. This denied appellant a fair trial and due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

"2-B. The trial court committed plain error in failing to instruct the jury on similar act testimony. This deprived appellant of a fair trial and due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

"2-C. Defense counsel violates an essential duty of care owed an accused, and therefore, the accused is denied his Sixth Amendment right to effective assistance of counsel, where defense counsel fails to object to prejudicial similar act testimony and fails to request a jury instruction regarding the use of similar act testimony.

"3-A. The trial court erred and abused its [*sic*] discretion in overruling defense counsel's objection to the introduction of testimony offered by a witness whose name was not provided on discovery. This deprived appellant of a fair trial and due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

"3-B. The trial court erred and abused its [*sic*] discretion in permitting the introduction of prejudicial hearsay testimony over objection of defense counsel and thereby denied appellant a fair trial and due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

"3-C. Defense counsel violates an essential duty of care owed an accused and, therefore, the accused is denied his Sixth Amendment right to effective assistance of counsel where defense counsel fails to request a sanction for a violation of discovery and fails to object to a misstatement by the prosecutor on closing argument in the same regard.

"4. The trial court committed prejudicial error in failing to instruct the jury on the lesser included offense of negligent homicide and, as such, it was error for the trial court to overrule appellant's motion for new trial in that regard. This deprived appellant of a fair trial and due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

"5. It is error to find appellant guilty of the firearm specification in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article ****990** I, Sections 9 and 10 of the Constitution of the State of Ohio.

"6. Appellant's conviction was not supported by sufficient credible evidence and was against the manifest weight of the evidence."

***60** In the first assignment of error, defendant contends that statements made by the prosecutor during the questioning of defendant and also during closing arguments were improper. The statements concerned past incidences of violence against the victim by defendant, the telephone conversation between defendant and the victim's sister and, finally, an allegation that the prosecutor implied to the jury that defense counsel did not believe in his own case, but the prosecutor did believe in hers.

Defendant himself testified that he and the victim had visited the night prosecutor's office after he struck her on two occasions. Regarding the telephone conversation, the record is clear that, while Mills had not previously talked with defendant on the phone, the caller

identified himself as defendant. She also testified she knew defendant for eight months and had been at his house. The prosecutor erroneously stated to the effect that Mills had previously talked to defendant on the phone and, thus, could recognize his voice. Mills testified that she had never before talked to defendant on the phone; she was not asked whether she recognized his voice and did not state that she did.

Regarding the supposed allegation by the prosecutor of counsels' belief in their respective cases, a review of the record indicates that this was the substance of the comment. The state contends that the prosecutor's improper comment was properly retaliatory to comments made by defense counsel. One instance referred to was an improper comment of defense counsel following the asking of an improper question by the prosecutor that: "They don't call her mad dog for nothing," to which the prosecutor did not object but, instead, withdrew the question. The state also alludes to questionable comments by defense counsel during closing argument insinuating that the prosecutor was overzealous. Not only did the prosecutor respond to such insinuation earlier in rebuttal argument, to which no objection was made, but the objected-to comment at the end of rebuttal tends to prove, rather than negate, the insinuation.

At the end of rebuttal, the prosecutor stated:

"I also draw your attention, and then I'll sit down and you can go into the jury room and decide this case, but the defense attorney also stated on opening statement--and I don't have the words exactly correct--but when attorneys argue the cases in trial that they don't necessarily believe in what they argue, and I submit to you, Ladies and Gentlemen, that Mr. Tyack speaks only for himself."

Unfortunately, the trial court overruled defense counsel's immediate objection to this crass attorney misconduct.

Not only is the prosecutor's comment improper and prejudicial, especially in light of its timing, but it is inaccurate as to a comment made by defense counsel during voir dire of the jury, rather than opening statement when he correctly stated:

"MR. TYACK: I talked to you a minute ago about the judge's inadvertent use of the word 'victim.' Another thing that Ms. McClellan has done repeatedly is talk about this as a 'murder case.'

"I think she would be the first to tell you that that is the way she refers to it because that is the charge that you are going to be looking at; but as you will find out shortly, the whole issue in this whole case is, you know, was there a murder or was there a manslaughter or was there a negligent homicide? Those things differ from each other based on what was in Mr. Bank's mind at the time the gun went off.

"Now can each of you, once again, decide the case based on the evidence you hear, not by some of the little slipups *61 those of us in the courtroom may make without thinking that we assume it one way or another?

"It's frankly unethical for either Ms. McClellan or I [*sic*] to express a personal belief about a case. We are supposed to **991 talk to you about what the evidence has shown, what the evidence will show and ask questions of you to determine whether you would be a good juror in this case, but it isn't up to us to stand in front of you and say I believe so and so, and therefore you should believe so and so.

"We're not allowed to do that, so if we do something that implies we are doing that, put it out of your mind. It's part of the ethics we function under as lawyers."

The defense counsel's comment was consistent with the Code of Professional Responsibility, DR 7-106(C), specifically providing with respect to trial conduct as follows:

"(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:

"(1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.

"(2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.

"(3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.

"(4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an

accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

" * * * "

[1] The trial of a murder case is not a "game" or a "battle of wits" between counsel. An attorney cannot properly fail to object to questionable or improper comments of opposing counsel so as to utilize them as a justification for an inaccurate and grossly improper comment at the conclusion of closing argument to the jury.

[2][3] Although we find no reversible error with respect to the misstatement of evidence or other questionable comments by the prosecutor, especially since no objection was made, the concluding comment was so egregious as to require reversal since the trial court erroneously overruled the objection thereto. For this reason and to this extent, the first assignment of error is sustained.

In the second assignment of error, defendant urges that it was error to overrule defendant's motion *in limine* regarding similar act testimony; that the trial court should have instructed the jury regarding similar act testimony; and that failure to request an instruction on similar act testimony resulted in defendant's receiving ineffective assistance of counsel.

[4] It was not error to allow the testimony of prior acts of violence against the victim committed by defendant since they were relevant to the issue of intent or purpose. See Evid.R. 404(B). Defendant admitted that he shot his wife. (Defendant also admitted he had struck his wife on two separate, prior occasions.)

Defendant stated that he loved his wife and that he would never do anything to harm her or his unborn child. In the facts of this case, it was appropriate to challenge that testimony by showing that defendant was capable of violent acts against his wife. Defendant concedes that R.C. 2945.59 allows evidence of any acts which tend to show motive or intent.

[5][6] Further, the failure to give a special limiting instruction was not plain error, and the failure to request such an instruction did not constitute ineffective *62 assistance of counsel. See Crim.R. 30 and 52(B). See, also, State v. Long (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804.

Although defendant contends that the other act evidence was too remote in time, being several months prior to the conduct at issue, it was within the trial court's discretion to admit the evidence. Accordingly, defendant's second assignment of error is overruled. In the third assignment of error, defendant contends that the trial court should not have allowed the testimony of a witness whose name was not provided on discovery; **992 that the witness gave hearsay testimony; and that trial counsel's failure to request a sanction for the alleged violation of discovery constitutes ineffective assistance of counsel.

On March 8, 1985, four days prior to the trial's commencing, defendant filed a motion *in limine* which identified Mills as a witness and indicated that trial counsel was aware of the nature of her testimony at that time.

[7][8] Although it did not constitute an admission as contended by the state, the witness' testimony concerning what defendant allegedly told her over the telephone was properly admitted under Evid.R. 803(3) as evidence of defendant's state of mind and mental feeling at the time. Although it occurred several months prior to the conduct at issue, it was within the trial court's discretion to admit the evidence as bearing upon the issues of motive and intent. While the foundation of defendant's identity was weak, this went to the weight rather than admissibility of the evidence, there being a permissible inference the witness could recognize defendant's voice, being his sister-in-law. Defendant's third assignment of error is overruled.

In the fourth assignment of error, defendant urges that the trial court was required to instruct the jury on negligent homicide as a lesser included offense and that the evidence and the defense's theory warranted such an instruction.

In State v. Gates (1981), 2 Ohio App.3d 485, 486, 2 OBR 611, 613, 442 N.E.2d 1321, 1323, this court held that:

"An offense may be a lesser included offense of another only if (1) the offense is a crime

of lesser degree than the other, (2) the offense of the greater degree cannot be committed without the offense of the lesser degree also being committed, and (3) some element of the greater offense is not required to prove the commission of the lesser offense. State v. Wilkins (1980), 64 Ohio St.2d 382, at 384 [18 O.O.3d 528, 415 N.E.2d 303]."

The state contends that the refusal to instruct on negligent homicide was correct because negligent homicide (R.C. 2903.05) contains an element not found in murder (R.C. 2903.02)--that death must be caused by a dangerous weapon or ordnance--citing State v. Hreno (1954), 162 Ohio St. 193, 55 O.O. 97, 122 N.E.2d 681. However, Hreno goes on to clarify that, "if certain but not all the elements of the offense charged in the indictment constitute in themselves an offense, then such offense is a lesser included offense." Id. at 197, 55 O.O. at 99, 122 N.E.2d at 683. Thus, even Hreno rejected the overly technical approach taken by the state.

[9] Under appropriate circumstances, negligent homicide is a lesser included offense of murder. See State v. Fulk (May 3, 1983), 82AP-577, unreported, at 10. Contra State v. Jenkins (1983), 13 Ohio App.3d 122, 13 OBR 141, 468 N.E.2d 387.

An analysis of whether one offense is a lesser included offense of another must commence with whether a person could be convicted of both offenses at the same trial if charged with both. If conviction of the greater offense would necessarily preclude conviction of the *63 lesser offense upon the same facts, the two offenses are so related that the lesser offense is included in the greater. The Jenkins court predicated its determination solely upon comparison of statutory language and concluded that negligent homicide is not a lesser included offense of murder because, in some murder cases, a charge upon negligent homicide would be precluded by the facts, even though in some cases the facts would present a possible case of negligent homicide rather than murder.

[10] In most cases of negligent homicide, a charge of murder would also be appropriate since the degree of the offense would depend solely upon the culpable mental state of the defendant, that is, whether the killing was purposeful or negligent. Accordingly, we conclude that, whether a lesser included offense is involved depends upon the evidence adduced at trial and cannot be determined solely by comparison of statutory language, which must be consulted to determine whether the lesser offense could be, rather than **993 always is, included within the greater offense. In other words, where it would be possible for the same evidence to prove both a greater offense and a lesser offense depending solely upon the culpable mental state of the accused, the lesser offense is a lesser included offense of the greater offense even though it might be possible in a different case to prove commission of the greater offense without proving the commission of the lesser. See State v. Loudermill (1965), 2 Ohio St.2d 79, 31 O.O.2d 60, 206 N.E.2d 198.

Therefore, we must determine whether the trial court was required to give the requested instruction:

"The mere fact that an offense can be a lesser included offense of another offense does not mean that a trial court must instruct on both offenses where the greater offense is charged. If the evidence adduced on behalf of the defense is such that, if accepted by the trier of fact, it would constitute a complete defense to all substantive elements of the crime charged, the trier of fact will not be permitted to consider a lesser included offense unless the trier of fact could reasonably find against the state and for the accused upon one or more of the elements of the crime charged, and for the state and against the accused on the remaining elements which, by themselves, would sustain a conviction upon a lesser included offense. The persuasiveness of the evidence regarding the lesser included offense is irrelevant. If under any reasonable view of the evidence it is possible for the trier of fact to find defendant not guilty of the greater offense and guilty of the lesser offense, the instruction on the lesser included offense must be given. The evidence must be considered in the light most favorable to defendant. * * * " State v. Gates, supra, 2 Ohio App.3d at 487, 2 OBR at 613-614, 442 N.E.2d at 1323-1324, citing State v. Wilkins, supra.

[11] In this case, the state sought to prove the elements of murder, i.e., that defendant

(1) purposely (2) caused the death of another. Negligent homicide has three elements: (1) negligently (2) causing the death of another (3) by means of a deadly weapon or ordnance. Defendant admitted that the gun was the means of death and this was not an issue in the case. The evidence indicated that only slight pressure on the trigger could cause the gun to discharge.

The jury could have found against the state on the issue of whether the death was caused purposely, but it held for the state on the issue of defendant causing the death of the victim. Accordingly, under the circumstances of this case, where it is uncontroverted that death was caused by a deadly weapon, if the jury concluded that the defendant negligently caused the death, that determination *64 would sustain a conviction of negligent homicide.

Therefore, the trial court was required to give the jury an instruction on negligent homicide as a lesser included offense of murder, and it was error not to do so. The defendant's fourth assignment of error is sustained.

In the fifth assignment of error, defendant contends that finding him guilty of the firearm specification violated both federal and state constitutional guarantees. This court has consistently rejected that proposition.

[12][13] R.C. 2929.71 provides sufficient notice that an additional term of years will be involved when a firearm is associated with a felony offense. State v. Jordan (July 11, 1985), Franklin App. No. 83AP-1168, unreported. Also, the firearm specification does not constitute cruel and unusual punishment. State v. Jones (1983), 13 Ohio App.3d 65, 13 O.B.R. 70, 468 N.E.2d 158. Solem v. Helm (1983), 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637, cited by defendant, is inapplicable because it involves the proportionality of sentences in felony convictions, and this issue was not raised on appeal. Jordan, supra. Accordingly, the fifth assignment of error is overruled.

[14] In the sixth assignment of error, defendant urges that his conviction was not supported by sufficient credible evidence and was against the manifest weight of the **994 evidence. This contention is not well-taken.

An expert testified that the gun would not accidentally fire unless in the cocked or half-cocked position. Defendant admitted the gun was half-cocked. However, the expert testified that, after being fired once, the cylinder would not turn unless some agent manually turned it and placed another bullet in front of the hammer. There is evidence the gun was fired twice.

Also, defendant not only testified that the shooting was accidental, but also that he loved his wife and unborn child and would do nothing to harm them. The state produced evidence which challenged that assertion. The jury observed all the witnesses, was the finder of fact, and was properly instructed on the burden of proof.

There was sufficient, credible evidence on which a jury could find defendant guilty of murder. Defendant's sixth assignment of error is overruled.

Defendant's first and fourth assignments of error are sustained, and the second, third, fifth, and sixth assignments of error are overruled. The judgment of the trial court is reversed, and this cause is remanded to the Court of Common Pleas of Franklin County for a new trial.

Judgment reversed and cause remanded.

WHITESIDE and NORRIS, JJ., concur.

STRAUSBAUGH, J., dissents.

STRAUSBAUGH, Judge, dissenting.

I must respectfully dissent from the majority opinion as to the fourth assignment of error. I believe that the trial court correctly determined that negligent homicide was not a lesser included offense based on the facts in this case and, therefore, it was not error to refuse to instruct the jury.

The majority quotes *State v. Gates, supra*, 2 Ohio App. at 487, 2 O.B.R. at 613-614, 442 N.E.2d at 1324, wherein the court stated: "[i]f under any reasonable view of the evidence it is possible for the trier of fact to find defendant not guilty of the greater offense and guilty of the lesser offense, the instruction on the lesser included offense must be given * * *." It is thus apparent that the determination of whether an instruction on a lesser included offense should be given must necessarily focus on the evidence presented at trial.

***65** In the instant case, it was clearly established that the victim was shot twice. The prosecution's expert witness, R.C. Fischer, testified that the weapon could discharge if it was in a half-cocked position and was bumped or dropped. The expert further testified that prior to discharging a second time, the weapon had to be either manually cocked or the cylinder had to be manually rotated in a clockwise direction. Without this manual rotation, the second bullet could not have been in front of the firing pin. In my opinion, based on this evidence, no one under the facts of this case could *reasonably* find against the state and for the defendant with respect to the element of "purposely." Only by a strained, unreasonable finding would it be possible for the trier of fact to find defendant not guilty of the greater offense and guilty of the lesser offense.

Accordingly, I would overrule defendant's fourth assignment of error, and affirm the judgment of the trial court.

Ohio App., 1986.

State v. Banks

31 Ohio App.3d 57, 508 N.E.2d 986, 31 O.B.R. 97

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Not Reported in N.E.2d, 1990 WL 129311 (Ohio App. 2 Dist.)
Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio, Second District, Montgomery County.

STATE of Ohio, Plaintiff-Appellee,

v.

John L. **AMANN**, Defendant-Appellant.

No. 11446.

Sept. 7, 1990.

Lee C. Falke, Prosecuting Attorney for Montgomery County by Ted E. Millsbaugh,
Assistant Prosecuting Attorney, Appellate Division, Dayton, for plaintiff-appellee.
Ronald E. Reichard, Dayton, for defendant-appellant.

OPINION

GRADY, Judge,

*1 Defendant-Appellant John L. Amann appeals his conviction and sentence for aggravated murder, a violation of R.C. 2903.01(A). Amann was also convicted of a separate firearms specification, a violation of R.C. 2929.71.

Amann presents two issues for our consideration. First, whether the trial court erred in not suppressing inculpatory statements made during a custodial interrogation. Second, whether the trial court erred in not instructing the jury on the offense of negligent homicide (R.C. 2903.05) as a lesser included offense.

We conclude the trial court did not err in finding that Amann voluntarily, knowingly, and intelligently waived of his *Miranda* rights. The state presented substantial evidence that Amann's waiver was uncoerced and made with "the requisite level of comprehension" necessary to "understand the nature of the right being abandon and the consequences of abandoning it." *Moran v. Burbine* (1986), 475 U.S. 412, 421. Further, we conclude the trial court was not obligated to give the jury an instruction on negligent homicide in that negligent homicide is not a lesser included offense to aggravated murder. Further, no set of facts in the record justified such an instruction.

We overrule Amann's two assignments of error. The decision of the trial court will be affirmed.

I.

On the morning of April 18, 1988, John Amann left his house, drove about three blocks, parked his car, and returned home. Once back at his house, Amann positioned himself near a bedroom window with a gun and watched for his neighbor, Jerry McKnight, to emerge from his house. Amann's wife had left him about two weeks earlier over an apparent affair with McKnight. As McKnight emerged from his house, Amann shot him two or three times. Amann then went outside and shot McKnight three more times as he lay on the ground. McKnight died as a result of the gunshot wounds. (Tr. 276-280). Facts presented at the suppression hearing of November 4, 9, and 16, 1988, showed that shortly after Amann shot McKnight he contacted Officer John L. Setty of the Moraine Police Department. Officer Setty spoke with Amann on the telephone while police traced the source of the call. (Tr. 21) Detective David Hicks eventually spotted Amann at a pay phone near a store on Stroop Road in Kettering. (Tr. 31) Amann was arrested inside the store. (Tr. 33)

As officers handcuffed Amann, Hicks informed him of his *Miranda* rights. As Hicks read Amann his rights, Amann asked "Is that dog dead?" (Tr. 34) When Hicks answered yes, Amann said " * * * good." (Tr. 34) Amann then interrupted Hicks again stating " * * * what rights? I shot him. What prison am I going to?" (Tr. 35) As Hicks continued Amann stated, " * * * what do I need a lawyer? I shot him." (Tr. 36) Amann repeated, "I don't need no damn lawyer." Id.

When Hicks finished reading the Miranda warnings, Amann responded that he understood his rights and indicated that he wanted to talk to Hicks about the shooting. Amann proceeded to describe the events surrounding the shooting, at one point telling Hicks, " * * * if he [Amann] didn't do it today, he would have done it tomorrow, if he didn't do it tomorrow, he would do it the next week but he intended to kill him." (Tr. 38).

*2 Amann was taken to the police station where he was asked to give a videotaped statement. Police again advised him of his rights. Amann acknowledged, on camera, that he understood his rights and indicated that he was waiving his rights. (Tr. 45-46)

According to police, at no time did Amann exhibit any sign that he was under the influence of alcohol, drugs or a mental disability. Id. Amann proceeded to describe in detail the events surrounding McKnight's death. Shortly thereafter, Amann was indicted on one count of Aggravated Murder with an accompanying firearms specification.

In addition to the testimony of the police officers involved in Amann's arrest and interrogation, two psychiatrists and a psychologist testified about Amann's mental state at the time of his arrest and interrogation. At the hearing Amann did not challenge the propriety of police conduct surrounding his arrest and interrogation, relying instead on the proposition that he was not competent to waive his rights.

Dr. Joseph Trevino testified that, in his expert opinion, Amann suffered from a non-psychotic passive-aggressive personality disorder. (Tr. 180, 191) According to Trevino, Amann was, at the time of his interrogation, in a highly agitated state. However, Trevino stated that neither Amann's 75 I.Q. (mildly retarded), nor his then agitated state, created any deficiency "in any cognition at any time on his part." (Tr. 192)

Dr. Arthur Schamm testified that, in his expert opinion, Amann suffered from a "severely constricted range of affective expression" indicative of a brief paranoid schizophrenic disorder episode. (Tr. 204-205) However, Schamm also testified that Amann appeared to have " * * * judgment functions that were adequate for ordinary affairs[.]" (Tr. 201).

Schamm indicated that "if in fact, John had not understood his *Miranda* Warnings * * * he's not the type of person who would have asked for an explanation." (Tr. 209) Schamm concluded that Amann's borderline personality disorder and low I.Q. indicated that he *may* have needed a more thorough explanation of his rights to fully appreciate the consequence of waiving them. (Tr. 213)

Dr. Bobbie Hopes testified that Amann had a 75 I.Q. which was "a little bit above the cutoff for being called retarded." (Tr. Tr. 237) Hopes concluded that Amann probably "didn't understand the meaning of, you have the right to remain silent, but I believe he did understand that he could have an attorney." (Tr. 244) However, Hopes admitted on cross examination that she had interviewed Amann only twice, once immediately after his arrest and once two days before the suppression hearing. (Tr. 250)

Dr. Trevino testified on rebuttal that, in his opinion, Amann's waiver of his rights " * * * was voluntary." (Tr. 295)

The court overruled Amann's motion to suppress. The court concluded that the testimony and other evidence proffered at the hearing, "including Defendant's affirmation that he understood his rights and his willingness to discuss with police the circumstances leading to and culminating with the alleged shooting" indicated that Amann "made a knowing and intelligent decision to waive his constitutional rights[.]"

*3 The case proceeded to trial on January 23, 1989. On January 30, 1989, Amann filed a request for jury instructions asking the court to instruct the jury on the offense of negligent homicide. The court declined to give such an instruction. (Tr. 938) Amann was found guilty of Aggravated Murder and the accompanying firearms specification and sentenced to life imprisonment plus an additional three years actual incarceration. Amann filed a timely notice of appeal presenting two assignments of error.

II.

Amann states in his first assignment of error:

THE TRIAL COURT ERRED WHEN IT OVERRULED DEFENDANT'S MOTION TO SUPPRESS ORAL STATEMENTS.

We note at the outset that Amann's argument turns on the proposition that the Ohio Constitution provides a higher degree of protection concerning an accused's waiver of

rights than does the Federal Constitution. However, Amann fails to furnish any jurisprudential support for this proposition. Therefore, our analysis of his assignment of error turns on the application of current Fifth Amendment standards to the facts of this case.

Courts have long recognized that custodial interrogation carries a "badge of intimidation" which presumptively compels an accused to provide incriminating evidence against himself. Miranda v. Arizona (1966), 384 U.S. 436, 457- 458. To dispel the factors of compulsion inherent in the custodial interrogation setting, the United States Supreme Court mandated in Miranda v. Arizona (1966), 384 U.S. 436, that prior to interrogation individuals must be apprised of their right to remain silent and their right to the assistance of counsel. The protections established in Miranda operate to temper "the inherently compelling pressures [of custodial interrogation] which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." Miranda, supra, at 467. See, also, State v. Malone (Dec. 13, 1989), Montgomery App.No. 10564, unreported; 2 Ringel, Searches & Seizures, Arrest and Confession, Section 26.2.

Whether an accused waived his rights freely and voluntarily is not a question of form but one of fact. North Carolina v. Butler (1979), 441 U.S. 369, 373. See, also, Colorado v. Spring (1987), 479 U.S. 564. A court may conclude that an accused waived his rights only if the totality of the circumstances establish both an uncoerced choice and "the requisite level of comprehension" necessary to understand the consequences of his action. Moran, supra, at 421. To this end, the state must establish by a preponderance of the evidence (1) that the accused relinquished his right voluntarily in the sense that "it was the product of a free choice rather than intimidation, coercion, or deception," and (2) that he waived "with full awareness of the nature of the right being abandoned and the consequences of the decision to abandon it." Moran, supra, at 421; Colorado v. Connelly (1986), 479 U.S. 157; Edwards v. Arizona (1981), 451 U.S. 477; State v. Broom (1988), 40 Ohio St.3d 277.

*4 There is no doubt that Amann waived his rights voluntarily. The state presented uncontroverted evidence that Amann "was not worn down by improper interrogation tactics or lengthy questioning or trickery or deceit." Fare v. Michael C. (1979), 442 U.S. 707, 726-727. Absent such coercive police conduct, there is no issue concerning the voluntariness of a waiver. See, Connelly, supra, at 164, 167. Rather, Amann argues that the state failed to show that he possessed "the requisite level of comprehension" necessary to make a knowing and intelligent waiver.

The record reveals that police apprised Amann of his constitutional rights on two separate occasions. On both occasions, Amann indicated that he understood his rights, stating at one point, "I will answer anything you want. Hell, I ain't got nothing to hide." (Tr. Tr. 45) Such statements, combined with evidence of Amann's acknowledgements that he understood his rights, met the state's burden of establishing by a preponderance of the evidence that Amann had the "requisite level of comprehension" necessary to knowingly and intelligently waive his rights. Amann's low I.Q. and rudimentary linguistic skills would not *per se* negate his ability to understand his rights and knowingly waive them. See, Connelly, supra, at 164-165. The state was not obligated to prove that Amann was "totally rational and properly motivated." Malone, supra, at 14. See, also, Spring, supra, at 574.

Amann attempted to rebut the state's contention by presenting evidence that he suffered from a misapprehension or misunderstanding of his rights sufficient to obviate the requisite level of comprehension. Amann presented two expert witnesses, Dr. Schamm and Dr. Hopes, who testified that he *might not* have comprehended the meaning of his rights or the consequences of his actions. However, neither witness stated that Amann did not possess the requisite level of comprehension necessary to understand his actions. Dr. Trevino, on the other hand, opined that Amann's judgment was not impaired and his waiver was voluntary. The weight to be given the expert opinions proffered at the suppression hearing was a matter for the trier of fact. See, State v. Fanning (1982), 1 Ohio St.3d 19; State v. Smith (June 6, 1990), Hamilton App. No. C-880287, unreported.

The record demonstrates that the trial court's conclusion was supported by competent, reliable and probative evidence and we find no error in its determination. Once the state establishes by a preponderance of the evidence that the accused was apprised of his rights, that his waiver was uncoerced, and that he appeared to possess "the requisite level of comprehension" necessary to understand the nature and consequences of his actions, the state overcomes the presumption of compulsion and the waiver becomes presumptively valid. The burden of attacking the validity of the waiver then shifts to the accused, who must present evidence establishing the contrary proposition. Should the accused fail to meet his burden, the trial court's finding of validity will not be disturbed.

*5 Amann's first assignment of error is overruled.

III.

Amann's states in his second assignment:

THE TRIAL COURT ERRED WHEN IT REFUSED TO INSTRUCT THE JURY ON NEGLIGENT HOMICIDE.

The Ohio Supreme Court recently stated that, "because negligent homicide is not always and 'necessarily included in' murder, we hold that negligent homicide is not a lesser included offense of murder." *State v. Koss (1990)*, 49 Ohio St.3d 213, 219. Thus, the trial court was not obligated to give an instruction on the offense of negligent homicide. Further, the evidence presented at trial did not support an instruction on negligent homicide. A court may not instruct the jury on matters which are not in issue or for which no evidence has been admitted. See, *Brandy v. State (1921)*, 102 Ohio St. 384. Here, the uncontroverted evidence presented at trial established that Amann shot McKnight two or three times from his bedroom window and then went outside and shot McKnight three additional times. There was no evidence or set of facts which even suggested that McKnight's death was the result of negligence.

Amann's second assignment of error is overruled.

IV.

For the reasons stated above, we overrule Amann's two assignments of error. The decision of the trial court is affirmed.

WILSON and FAIN, JJ., concur.

Ohio App., 1990.

State v. Amann

Not Reported in N.E.2d, 1990 WL 129311 (Ohio App. 2 Dist.)

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v.

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Sept. 7, 1990.

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THE TRIAL COURT ERRED WHEN IT OVERRULED DEFENDANT'S MOTION TO SUPPRESS ORAL STATEMENTS.

We note at the outset that Amann's argument turns on the proposition that the Ohio Constitution provides a higher degree of protection concerning an accused's waiver of

rights than does the Federal Constitution. However, Amann fails to furnish any jurisprudential support for this proposition. Therefore, our analysis of his assignment of error turns on the application of current Fifth Amendment standards to the facts of this case.

Courts have long recognized that custodial interrogation carries a "badge of intimidation" which presumptively compels an accused to provide incriminating evidence against himself. Miranda v. Arizona (1966), 384 U.S. 436, 457- 458. To dispel the factors of compulsion inherent in the custodial interrogation setting, the United States Supreme Court mandated in Miranda v. Arizona (1966), 384 U.S. 436, that prior to interrogation individuals must be apprised of their right to remain silent and their right to the assistance of counsel. The protections established in Miranda operate to temper "the inherently compelling pressures [of custodial interrogation] which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." Miranda, supra, at 467. See, also, State v. Malone (Dec. 13, 1989), Montgomery App.No. 10564, unreported; 2 Ringel, Searches & Seizures, Arrest and Confession, Section 26.2.

Whether an accused waived his rights freely and voluntarily is not a question of form but one of fact. North Carolina v. Butler (1979), 441 U.S. 369, 373. See, also, Colorado v. Spring (1987), 479 U.S. 564. A court may conclude that an accused waived his rights only if the totality of the circumstances establish both an uncoerced choice and "the requisite level of comprehension" necessary to understand the consequences of his action. Moran, supra, at 421. To this end, the state must establish by a preponderance of the evidence (1) that the accused relinquished his right voluntarily in the sense that "it was the product of a free choice rather than intimidation, coercion, or deception," and (2) that he waived "with full awareness of the nature of the right being abandoned and the consequences of the decision to abandon it." Moran, supra, at 421; Colorado v. Connelly (1986), 479 U.S. 157; Edwards v. Arizona (1981), 451 U.S. 477; State v. Broom (1988), 40 Ohio St.3d 277.

*4 There is no doubt that Amann waived his rights voluntarily. The state presented uncontroverted evidence that Amann "was not worn down by improper interrogation tactics or lengthy questioning or trickery or deceit." Fare v. Michael C. (1979), 442 U.S. 707, 726-727. Absent such coercive police conduct, there is no issue concerning the voluntariness of a waiver. See, Connelly, supra, at 164, 167. Rather, Amann argues that the state failed to show that he possessed "the requisite level of comprehension" necessary to make a knowing and intelligent waiver.

The record reveals that police apprised Amann of his constitutional rights on two separate occasions. On both occasions, Amann indicated that he understood his rights, stating at one point, "I will answer anything you want. Hell, I ain't got nothing to hide." (Tr. Tr. 45) Such statements, combined with evidence of Amann's acknowledgements that he understood his rights, met the state's burden of establishing by a preponderance of the evidence that Amann had the "requisite level of comprehension" necessary to knowingly and intelligently waive his rights. Amann's low I.Q. and rudimentary linguistic skills would not *per se* negate his ability to understand his rights and knowingly waive them. See, Connelly, supra, at 164-165. The state was not obligated to prove that Amann was "totally rational and properly motivated." Malone, supra, at 14. See, also, Spring, supra, at 574.

Amann attempted to rebut the state's contention by presenting evidence that he suffered from a misapprehension or misunderstanding of his rights sufficient to obviate the requisite level of comprehension. Amann presented two expert witnesses, Dr. Schamm and Dr. Hopes, who testified that he *might not* have comprehended the meaning of his rights or the consequences of his actions. However, neither witness stated that Amann did not possess the requisite level of comprehension necessary to understand his actions. Dr. Trevino, on the other hand, opined that Amann's judgment was not impaired and his waiver was voluntary. The weight to be given the expert opinions proffered at the suppression hearing was a matter for the trier of fact. See, State v. Fanning (1982), 1 Ohio St.3d 19; State v. Smith (June 6, 1990), Hamilton App. No. C-880287, unreported.

The record demonstrates that the trial court's conclusion was supported by competent, reliable and probative evidence and we find no error in its determination. Once the state establishes by a preponderance of the evidence that the accused was apprised of his rights, that his waiver was uncoerced, and that he appeared to possess "the requisite level of comprehension" necessary to understand the nature and consequences of his actions, the state overcomes the presumption of compulsion and the waiver becomes presumptively valid. The burden of attacking the validity of the waiver then shifts to the accused, who must present evidence establishing the contrary proposition. Should the accused fail to meet his burden, the trial court's finding of validity will not be disturbed.

*5 Amann's first assignment of error is overruled.

III.

Amann's states in his second assignment:

THE TRIAL COURT ERRED WHEN IT REFUSED TO INSTRUCT THE JURY ON NEGLIGENT HOMICIDE.

The Ohio Supreme Court recently stated that, "because negligent homicide is not always and 'necessarily included in' murder, we hold that negligent homicide is not a lesser included offense of murder." State v. Koss (1990), 49 Ohio St.3d 213, 219. Thus, the trial court was not obligated to give an instruction on the offense of negligent homicide. Further, the evidence presented at trial did not support an instruction on negligent homicide. A court may not instruct the jury on matters which are not in issue or for which no evidence has been admitted. See, Brandy v. State (1921), 102 Ohio St. 384. Here, the uncontroverted evidence presented at trial established that Amann shot McKnight two or three times from his bedroom window and then went outside and shot McKnight three additional times. There was no evidence or set of facts which even suggested that McKnight's death was the result of negligence.

Amann's second assignment of error is overruled.

IV.

For the reasons stated above, we overrule Amann's two assignments of error. The decision of the trial court is affirmed.

WILSON and FAIN, JJ., concur.

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Not Reported in N.E.2d, 1990 WL 129311 (Ohio App. 2 Dist.)

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