

**IN THE
SUPREME COURT OF OHIO**

STATE OF OHIO	:	NO. 2009-0091
Plaintiff-Appellee	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District
vs.	:	
RALPH CARUSONE	:	Court of Appeals Case Number C-070653
Defendant-Appellant	:	

MEMORANDUM IN RESPONSE

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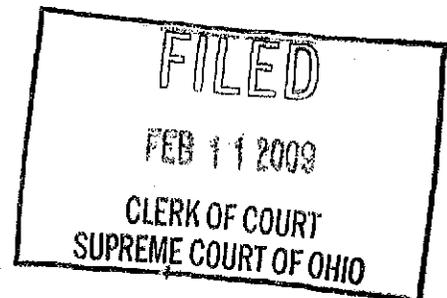


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EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION

The issues raised by defendant-appellant have already been resolved by this Court and other Ohio Courts. No issue of great public or general interest is presented, nor does any substantial constitutional question exist. Jurisdiction is properly denied.

STATEMENT OF THE CASE AND FACTS

B-0606586

Carusone was indicted as follows for his killing of Derek Rininger:

COUNT 1: Murder 2903.02(A)[SF]
COUNT 2: Murder 2903.02(B)[SF]

After a jury trial in the courtroom of the Honorable Dennis S. Helmick, defendant was found guilty of Murder as charged in Count 2; and not guilty of Murder in Count 1. He was sentenced to 15 years to life, consecutive to sentences in B-010608 (Reckless Homicide) and B-0402869 (Possession of Cocaine) for a total sentence of 22 years to life, Department of Corrections. On December 10, 2008, the Court of Appeals affirmed, but remanded the case to the trial court to calculate jail time credit.

This appeal ensued.

Statement of Facts:

B-0606586 - Murder of Derek Rininger

Jennifer (Jen) Kron was the mother of Derek Rininger's children. However, they lived apart and shared custody.

Jen lived with a roommate Melinda Scalf. Melinda had been upset with Derek because she suspected him of taking money from her purse.

Days before the murder, Jen met defendant Carusone and they began a dating relationship. On the evening in question, defendant was visiting Jen at her apartment. Melinda was also there. At some point

in the evening, Rininger called Jen. Melinda, still upset about the money, also spoke with Rininger. It was agreed Melinda would go over to Rininger's residence to retrieve her money. Jen would drive, and defendant Carusone came along as well.

When Jen pulled up in front of Rininger's home, he came running out to meet the car. He ran up to the passenger side where defendant was seated. Defendant exited the car to meet Rininger. The two fought for a few minutes. Eventually, Rininger ran up to Jen's side of the car, bleeding profusely. Defendant re-entered the car relatively unscathed.

Jen sped off. Rininger struggled to run back into the house and call 9-1-1. When police arrived, Rininger was gasping for air in his yard - bleeding out. He died in an ambulance.

Meanwhile, defendant had Jen drop him off at a house where he set about burning his clothes. He told Jacob Carroll that he had just "shanked" someone. Carroll assumed defendant had used the Smith & Wesson knife defendant had shown him the night before.

At trial, defendant claimed self-defense. But there was no evidence that Rininger had provoked any use of deadly force. Indeed, Rininger had not armed himself at all. His small pocket knife was found in his shorts - unused and soaked in his own blood.

Simply put, defendant had brought a knife to a fist-fight and committed murder.

ARGUMENT IN RESPONSE TO DEFENDANT'S FIRST, SECOND AND THIRD PROPOSITIONS OF LAW

FIRST PROPOSITION OF LAW: DEFENDANT'S CONVICTIONS WERE WELL-SUPPORTED BY THE WEIGHT AND SUFFICIENCY OF THE EVIDENCE.

When reviewing the sufficiency of the evidence to support a criminal conviction, this Court must examine the evidence admitted at trial in the light most favorable to the prosecution and determine whether such evidence could have convinced any rational trier of fact that the essential elements of the crime had been proved beyond a reasonable doubt.¹ In deciding if the evidence was sufficient, this Court neither

¹ See *State v. Thomkins* (1997), 78 Ohio St. 3d 380, 678 N.E.2d 541.

resolves evidentiary conflicts nor assess the credibility of the witnesses, as both are functions reserved for the trier of fact.² In contrast, when reviewing the weight of the evidence, this Court must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and decide whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created a manifest miscarriage of justice.³ A new trial should be granted only in exceptional cases where the evidence weighs heavily against conviction.⁴

Defendant was found guilty of Murder - causing the death of Derek Rininger as a proximate result of committing Felonious Assault - R.C. 2903.02(B).

Defendant claims his murder conviction was contrary to law because he demonstrated he acted only in self-defense. However, substantial evidence was presented to support the jury's verdict that defendant knowingly stabbed Rininger causing his death - and did so without sufficient provocation to establish a self-defense claim.

IDENTITY

Eyewitnesses and defendant's own statements established he was the one who stabbed Rininger. Jen Kron and Melinda Scalf both testified that defendant fought with Rininger outside of Kron's car. Within seconds of separating, Rininger was bleeding profusely - defendant was re-entering the car relatively unscathed. (T.p. 572, 576, 387-400, 632)

Defendant told Jacob Carroll "I shanked him." (T.p. 678)

KNIFE

An eyewitness and defendant's own statement established defendant had a knife. Jacob Carroll testified that defendant brandished his Smith & Wesson pocket knife in a bar the night before the murder. After the murder, defendant told Carroll "I shanked him." (T.p. 678, 672, 701-703)

² See *State v. Willard* (2001), 144 Ohio App. 3d 767, 777-778, 761 N.E.2d 688.

³ See *Thompkins*, supra, 78 Ohio St. 3d at 387.

⁴ *Id.*

KNOWINGLY

The State established defendant acted knowingly because of the location of the wound - defendant stabbed Rininger with great force in the chest near his heart. And he admitted it to Carroll later. (T.p. 715-727, 678)

SELF-DEFENSE

Defendant was not provoked. Eyewitnesses testified that defendant exited the car to meet Rininger as Rininger charged the car. Defendant was prepared to fight. (T.p. 631-632, 398-406) And defendant took a knife to a fist-fight. The force defendant used was unreasonable and unnecessary. No evidence was presented that Rininger was armed, Rininger's small utility pocket knife was found inside his shorts unused - but soaked in Rininger's own blood.

Carusone's first, second and third propositions of law are properly overruled.

ARGUMENT IN RESPONSE TO DEFENDANT'S FOURTH PROPOSITION OF LAW

SECOND PROPOSITION OF LAW: CARUSONE'S SENTENCE WAS PROPER UNDER *FOSTER* AS IT WAS WITHIN THE STATUTORY RANGE AND, COMPLIED WITH STATUTORY MANDATE. THE TRIAL COURT NEED NO LONGER PROVIDE REASONS FOR IMPOSING MORE THAN THE MINIMUM SENTENCE, OR CONSECUTIVE SENTENCES.

In his fourth proposition of law, Carusone claims his sentence is erroneous as it is excessive. However, because a trial court now has full discretion to impose a prison sentence within the statutory range and is no longer required to provide reasons for imposing more than the minimum term, or consecutive terms, Carusone's claim fails.

In *State v. Foster*,⁵ this Court held that judicial factfinding is not required before a trial court imposes consecutive prison terms. Trial courts now have full discretion to impose a prison sentence within the statutory range and are no longer required to provide reasons for imposing a sentence involving consecutive prison terms.

⁵ *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

The terms imposed upon Carusone were thus proper.

ARGUMENT IN RESPONSE TO DEFENDANT'S FIFTH PROPOSITION OF LAW

THIRD PROPOSITION OF LAW: DEFENDANT'S INDICTMENT DID NOT LEAD TO MULTIPLE OTHER ERRORS AS IN COLON I. PLAIN ERROR ANALYSIS IS APPROPRIATE - NOT STRUCTURAL ERROR ANALYSIS. SEE COLON II. NO PLAIN ERROR IS DEMONSTRATED.

Carusone first argues that his indictment for Murder in Count 2 omitted the "knowingly" mens rea element and was thus defective. Citing *State v. Colon I*,⁶ defendant maintains this deficiency was structural error requiring reversal of his conviction. Defendant's claim fails.

First, the State did not have to prove a culpable mental state for murder - just the state for the underlying felony.⁷ Here, the predicate offense was felonious assault which requires a mental state of knowingly. Defendant's indictment was sufficient.⁸

In *Colon I*, this Court held that the indictment against Colon was defective because it failed to charge an essential element of the offense - the mens rea of the charged offense. This defect led to multiple other errors which resulted in structural error in Colon's case.

Carusone has read *Colon I* to require application of structural error analysis in every defective indictment case when the indictment omits an essential mens rea element. However, that was not this Court's intent. Upon a motion for reconsideration, this Court made clear that application of structural-error analysis to a defective indictment case will be appropriate only in rare cases. In *Colon II*,⁹ it said:

"... In most defective-indictment cases in which the indictment fails to include an essential element of the charge, we expect that plain-error analysis, pursuant to Crim. R. 52(B), will be the proper analysis to apply. ..."

Here, no plain error is demonstrated as there is no evidence in the record that Carusone was unaware that "knowingly" was an element of the crime of Felonious Assault as charged in Count 2

⁶ 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917

⁷ *State v. Bowles* (May 11, 2001), 11th Dist. No. 99-L-075.

⁸ *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707, 853 N.E.2d 1162.

⁹ *State v. Colon*, Slip Opinion No. 2008-Ohio-3749 (7-31-08)

Murder. Indeed the State argued Carusone acted “knowingly” in Count 2 (T.p. 361, 946-948, 972); the defense argued Carusone acted “knowingly” in self-defense (T.p. 372, 979-996); and the trial court instructed the jury on “knowingly” for Count 2. (T.p. 1012-1014) The existence of this mens rea (knowingly) was actually discussed by defense counsel with the trial court during defendant’s motion for new trial. (T.p. 1048-1054)

Unlike in *Colon I*, Caruson’s indictment did not result in several violations of his rights. No plain error is demonstrated. Carusone’s fifth proposition of law is properly overruled.

ARGUMENT IN RESPONSE TO DEFENDANT’S SIXTH PROPOSITIONS OF LAW

FOURTH PROPOSITION OF LAW: CARUSONE’S COUNSEL WAIVED TIME AND CARUSONE WAS BOUND BY THE WAIVERS. NO DUE PROCESS VIOLATION OCCURRED.

Next, defendant claims his due process rights were violated by the state’s production of favorable evidence nine months after his discovery request. Defendant claims this untimely response violated the State’s obligation under *Brady v. Maryland*¹⁰ and violated his right to a speedy trial. Defendant’s claims fail.

BACKGROUND

Defendant’s first counsel, Ken Lawson, filed for favorable evidence on September 19, 2006. The State filed its response to the demand for favorable evidence on June 8, 2007. On August 20, 2007, defendant’s jury trial commenced.

BRADY V. MARYLAND

In *Brady v. Maryland*,¹¹ the United States Supreme Court held that the prosecution’s suppression of evidence favorable to the accused violates due process where the evidence is material to guilt or punishment, regardless of the prosecution’s good or bad faith.

¹⁰ (1963), 373 U.S. 83; 83 S.Ct. 1194, 10 L.Ed.2d 215

¹¹ *Id.*

Here, no *Brady* violation occurred. The State did not suppress favorable evidence. Indeed, it disclosed favorable evidence to defendant 2 ½ months prior to trial. And defense counsel used this evidence to impeach State witnesses. (T.p. 647, 429-430, 394) To characterize this scenario as a *Brady* violation is simply erroneous.

SPEEDY TRIAL

The essence of defendant's claim is that the State's failure to comply in a more timely manner required defendant's case to be continued too many times - violating his right to a speedy trial. However, the record reveals that Mr. Lawson waived time on November 14, 2006. On February 1, 2007, Mr. Lawson was unavailable and the case was again continued. On February 6, 2007, the defendant was in court and agreed to waive time until March 8, 2007. (T.p. 111-112) On May 8, 2007, Mr. Lawson explained to the court he could no longer represent defendant and the court appointed Mr. Perry Ancona. Mr. Ancona agreed to waive time. (T.p. 114-118) On July 13, 2007, defendant filed a motion to dismiss on speedy trial grounds. The trial court denied the motion. (T.p. 136) The trial court's judgment was proper.

At the hearing on defendant's motion to dismiss, defendant's new counsel (Carl Lewis) argued that defendant Carusone had never personally consented to the time waivers executed on his behalf by his previous counsel. (T.p. 122-136) However, this Court has held that "a defendant's right to be brought to trial within the time limits expressed in R.C. 2945.71 may be waived by his counsel for reasons of trial preparation and the defendant is bound by the waiver even though the waiver is executed without his consent."¹²

SUMMARY

Defendant's trial was not delayed or prejudiced by the State's late response to defendant's motion for favorable evidence. Defendant's trial was repeatedly continued because defendant's initial counsel was

¹² *State v. McBreen* (1978), 54 Ohio St.2d 315, 320.

simply not prepared. The record shows that Carusone's previous defense counsel had waived time and Carusone was bound by the waivers.¹³

ARGUMENT IN RESPONSE TO DEFENDANT'S SEVENTH PROPOSITION OF LAW

FIFTH PROPOSITION OF LAW: THE ADMISSION OF RELEVANT "OTHER-ACTS" WAS PROPER HERE AS IT TENDED TO SHOW IDENTITY AND OPPORTUNITY.

In this seventh proposition of law, defendant argues the trial court erred in allowing testimony that defendant had brandished a six inch Smith & Wesson pocketknife at a bar when out with friends days prior to the murder. Defendant's claim fails. First, it is noted that defendant did not object to this testimony, so all but plain error is waived. (T.p. 672-673) Nonetheless, it was proper under Evid. R. 404(B).

Evid. R. 404(B) provides that "evidence of the 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." But such evidence is admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

"Other acts" evidence may be admitted if (1) substantial proof is adduced to show that the person against whom the evidence is offered committed the other act; (2) one of the matters enumerated in the rule or the statute is a material issue at trial; and (3) the evidence tends to prove the material enumerated matter.¹⁴ Differences between the other-acts evidence and evidence relating to the charged offense "go to the weight of the evidence, not its admissibility."¹⁵

The admission or exclusion of relevant evidence will not be reversed absent an abuse of the trial court's discretion resulting in material prejudice to the defendant.

¹³ See *State v. Taylor*, 98 Ohio St.3d 27, 2002-Ohio-7017, 781 N.E.2d 72; *State v. McBreen* (1978), 54 Ohio St.2d 315, 376 N.E.2d 593; *State v. Matthews*, 1st Dist. Nos. C-060669 and C-060692, 2007-Ohio-4881.

¹⁴ See *State v. Curry* (1975), 43 Ohio St.2d 66, 330 N.E.2d 720, syllabus.

¹⁵ *State v. Knight* (1988), 131 Ohio App.3d 349, 353, 722 N.E.2d 568.

Here, Dr. Michael Kenny testified that Derek Rininger died as a result of a stab wound to his heart. He also testified that the wound was consistent with a pocketknife. (T.p. 715) However, no pocketknife was ever recovered at the scene or from defendant Carusone. So, at least two matters set forth in Evid. R. 404(B) were at issue in this case: identity and opportunity. Indeed, defense counsel floated the idea that Jennifer Kron may have stabbed Derek Rininger. In this context, it is clear that Jacob Carroll's testimony was proper.

Carroll testified that he had been out at a bar with Carusone and Jennifer Kron shortly before the murder, and that Carusone had shown him a pocketknife defendant kept on his belt. (T.p. 672-673) This evidence tends to identify defendant as the perpetrator and certainly demonstrates he had the opportunity to do the stabbing. And, the temporality of this evidence is significant too.¹⁶ Defendant brandished the knife within 48 hours of the stabbing of Rininger. The trial court did not abuse its discretion by allowing this evidence.

Defendant's seventh proposition of law is properly overruled.

ARGUMENT IN RESPONSE TO DEFENDANT'S EIGHTH PROPOSITION OF LAW

SIXTH PROPOSITION OF LAW: CARUSONE HAS NOT DEMONSTRATED INEFFECTIVE ASSISTANCE OF COUNSEL. THE OTHER-ACTS TESTIMONY WAS ADMISSIBLE AND THE DECISION TO FORGO AN INSTRUCTION ON VOLUNTARY MANSLAUGHTER WAS SOUND TRIAL STRATEGY.

Defendant claims he was denied effective assistance of counsel by counsel's failure to:

- object to "other acts" testimony;
- request a lesser-included offense instruction on voluntary manslaughter;
- insure proper jail time credit was calculated under B-0100608.

In order to warrant a reversal of a conviction based upon ineffective assistance of counsel, a defendant must satisfy the two-prong test set forth in *Strickland v. Washington*¹⁷ which requires the defendant to "show, first, that counsel's performance was deficient and, second, that counsel's deficient

¹⁶ See *State v. Roberts*, supra.

¹⁷ (1984), 466 U.S. 668, 104 S.Ct. 2052

performance prejudiced the defense so as to deprive the defendant of a fair trial.”¹⁸ Carusone can demonstrate neither prong.

OTHER ACTS

The “other acts” testimony was proper and admissible. Counsel’s failure to object to it was not outcome-determinative. And it may well have been good trial strategy to avoid drawing attention to it by objecting.

VOLUNTARY MANSLAUGHTER INSTRUCTION

Voluntary manslaughter is an inferior degree of murder.¹⁹ However, counsel’s failure to request an instruction on it here was good trial strategy.

The test for whether a judge should give an instruction on voluntary manslaughter is the same test to be applied as when an instruction on a lesser included offense is sought.²⁰ There is a strong presumption that trial counsel’s failure to request an instruction on a lesser offense is a matter of trial strategy, and “[t]his is especially true when the defendant claims self-defense because an instruction on the lesser offense may confuse the jury with inconsistent theories of the defense and/or reduce the hope of attaining a complete acquittal.”²¹

Fear alone is insufficient to demonstrate the kind of emotional state necessary to constitute sudden passion or fit of rage.²² Further, evidence supporting the privilege of self-defense, i.e., that the defendant feared for his own and other’s personal safety, does not constitute sudden passion or fit of rage as contemplated by the voluntary manslaughter statute.²³

¹⁸ *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, at ¶ 95.

¹⁹ *State v. Griffin*, 175 Ohio App.3d 325, 886 N.E.2d 921, 2008-Ohio-702.

²⁰ *State v. Lee*, Franklin App. No. 04AP234, 2004-Ohio-6834, at ¶ 22 (finding that “trial counsel’s decision not to request a jury instruction on voluntary manslaughter could be considered a matter of trial strategy”).

²¹ *Harris*, supra, at 533. See also, *State v. Mackey* (Dec. 9, 1999), Cuyahoga App. No. 75300 (“It is reasonable trial strategy to argue self-defense and not request an instruction on a lesser offense”).

²² *Mack*, supra, at 201.

²³ *State v. Harris* (1998), 129 Ohio App.3d 527, 535.

Here, Carusone's theory of the case was self-defense and the court provided a self-defense instruction. Carusone's theory was basically: "it was him or me." But the record does not support a determination that Carusone was provoked by sudden rage or passion. Eyewitnesses testified that Carusone exited the car in order to meet the charging Rininger and to confront him. Defendant was prepared to fight.

In short, an instruction on voluntary manslaughter would have been incompatible with Carusone's theory of self-defense. Counsel's decision was sound trial strategy.²⁴

JAIL TIME CREDIT

Defendant's counsel had no duty to calculate jail time credit. Such a calculation is a ministerial act to be performed by the trial court.

The Revised Code imposes upon a sentencing court the duty to calculate, and to specify in the judgment of conviction, the total number of days that the defendant has been confined for any reason arising out of the offense for which he has been convicted.²⁵

Moreover, Carusone can demonstrate no prejudice as the Court of Appeals remanded the case with instructions to the trial court to properly calculate jail credit.

Defendant's eighth proposition of law is properly overruled.

ARGUMENT IN RESPONSE TO DEFENDANT'S NINTH PROPOSITION OF LAW

SEVENTH PROPOSITION OF LAW: THE PROSECUTOR'S CLOSING ARGUMENT WAS ENTIRELY PROPER BECAUSE IT WAS BASED ON EVIDENCE IN THE RECORD OR REASONABLE INFERENCES DRAWN THERE FROM.

The conduct of the prosecuting attorney is not grounds for reversal unless it deprived the defendant of a fair trial.²⁶

²⁴ See *State v. Bridgewater*, 2008 WL 324407 (Ohio App. 10 Dist.), 2008-Ohio-466.

²⁵ See *State v. Weaver*, Slip copy, 2006 WL 2788246 (Ohio App. 1 Dist.), 2006-Ohio-5072.

²⁶ *State v. Keenan* (1993), 66 Ohio St.3d 402, 613 N.E.2d 203

The test for prosecutorial misconduct is whether the prosecutor's remarks were improper, and, if so, whether they prejudicially affected the accused's substantial rights.²⁷

Defendant first claims the State committed prosecutorial misconduct by failing to disclose favorable evidence on a timely basis. This claim fails for the reasons previously set forth.

Defendant also claims the prosecutor unduly prejudiced him in her closing argument wherein she:

- referenced Jacob Carroll's testimony that defendant had brandished a pocket knife the night before the murder (T.p. 947, 962, 970)
- argued that defendant disposed of the pocket knife (T.p. 971, 998)
- argued that Derek Rininger never armed himself with his pocket knife. (T.p. 997)

Defendant claims fail.

First, it is noted that defendant failed to object to any of these comments, so all but plain error is waived. And no plain error is demonstrated.

Jacob Carroll's testimony, that defendant had brandished a pocket knife the night before the murder, was properly admitted into evidence. So, the prosecutor's comments were fair because they were based on evidence in the record. The prosecutor's argument that defendant must have disposed of the knife was a fair inference from evidence in the record. After all, the record indicated that no knife was ever recovered and that defendant had been observed burning his clothes after the murder. (T.p. 836, 676-677) Similarly, the prosecutor's argument that Derek Rininger never armed himself with his little utility pocket knife was supported by evidence in the record. Rininger's knife was found in his short's pocket soaked in Rininger's own blood. (T.p. 457)

No unduly prejudicial error is demonstrated - much less plain error.

Defendant's ninth proposition of law is properly overruled.

ARGUMENT IN RESPONSE TO DEFENDANT'S TENTH PROPOSITION OF LAW

EIGHTH PROPOSITION OF LAW: The trial court merely referred the jury to its previous instruction on self-defense. Any error in the ex parte communication with the jury was harmless.

²⁷ *State v. Lott* (1990), 51 Ohio St.3d 160, 555 N.E.2d 293.

Next, Carusone argues the trial court improperly engaged in ex parte communication with the jury when it answered their question regarding self defense jury instructions. Defendant's claim fails.

It is well established that a defendant in a criminal case has a right to be present when, pursuant to a request from the jury during its deliberations, the judge communicates with the jury regarding his instructions.²⁸

This Court has made clear, however, that erroneous communications between the judge and jury constitute good cause for a new trial only if the communications prejudiced the defendant's right to a fair trial.²⁹

An alleged ex parte communication between a judge and jury is harmless error unless a party can establish that it was prejudiced by the communication.³⁰ Substantive matters may include discussions between a judge and juror of legal issues involved in the case, applicable law, the charge to the jury, or a fact in controversy.³¹ Thus, even where the communication involves a substantive issue, the defendant still must demonstrate that he was prejudiced by the communication.³²

Where the judge merely restates previously given instructions, the communication between the judge and jury outside of the defendants's presence has been found to be harmless.³³

Here, the jury asked the court a question about self-defense instructions and the judge answered as

follows:

THE COURT: "...I have forgotten that there was one question. The question will be given tot he court reporter. And if I will be able to read it, it says: Please explain if the terms "reasonable grounds to believe and an honest belief, even if mistaken" applies to

²⁸ *State v. Abrams* (1974), 39 Ohio St.2d 53, 68 O.O.2d 30, 313 N.E.2d 823.

²⁹ *Abrams*, 39 Ohio St.2d at 56, 68 O.O.2d 30, 313 N.E.2d 823; *State v. Jenkins* (1984), 15 Ohio St.3d 164, 233-237, 15 OBR 311, 473 N.E.2d 264.

³⁰ *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 524 N.E.2d 881, paragraph four of the syllabus.

³¹ *Orenski v. Zaremba Mtg. Co.*, Cuyahoga App. No. 80402, 2002-Ohio-3101. See *State v. Musgrave* (Apr. 24, 2000), Knox App. No. 98CA10.

³² *State v. Crumedy*, Cuyahoga App. No. 84083, 2004-Ohio-6006.

³³ See *Abrams*, 39 Ohio St.2d 53, 68 O.O.2d 30, 313 N.E.2d 823 (ex parte communication was harmless when the judge offered to reread his original instruction and the jurors declined the offer.

imminent danger, great bodily harm and his only means of escape from such danger was by the use of deadly force as found under self-defense page 10 paragraph B.

The only thing that I can tell you is that I have read the jury instructions approved by the Supreme Court of Ohio and I hope they are somewhat self-explanatory. And you have to follow in the instructions as they have been given to you.

And then the attorneys have looked at them. They are in agreement that they properly comply with the law of Ohio.

And I am not sure that I can answer your question in any manner or any way different.

If you want to propose a question tomorrow, fine, but the instructions are there, you have copies of the instructions.

So hopefully with your combined brilliance you will be able to arrive at whatever result conforms with the facts.

Anything else? Hope that you all have a very pleasant evening. We will see you back here at 10:00.

* * *

(Jury room proceedings concluded.)

(Proceedings continued in progress at 5:00 p.m.)

(T.p. 1036-1038)

Clearly, defendant can show no prejudice. No objections were made to the trial court's procedure, so absent plain error, any error regarding the trial court's ex parte discussion was waived.

There is no plain error because the outcome of the trial would not have been different had an objection been made. According to the discussion on the record, the court merely informed the jury that they received the law on self defense when it instructed them and the court would not give any additional information on the instruction. No plain error is demonstrated. Any error in the ex parte communication was harmless beyond reasonable doubt. Carusone's tenth proposition of law is properly overruled.

**ARGUMENT IN RESPONSE TO DEFENDANT'S ELEVENTH
ASSIGNMENT OF ERROR**

NINTH PROPOSITION OF LAW: Defendant was properly found guilty of community control violations as he:

- was convicted of murder;
- was charged with wanton endangerment in Kentucky;
- traveled outside of Hamilton County without permission of his probation officer.

Because Carusone was properly convicted of Murder, the Murder charge serves as sufficient basis to find defendant guilty of community control violations in B-0100608 and B-0402869. Specifically, defendant violated Rule 2 which is to obey all laws. (T.p. 1056) Additionally, defendant was charged with attempted murder or wanton endangerment in Kentucky - another law violation. (T.p. 1056) And defendant traveled to Kentucky in violation of Rule 7 which required defendant to obtain permission from his probation officer prior to traveling outside Hamilton County. (T.p. 1056)

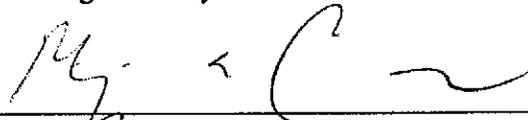
Defendant was properly found guilty of community control violations. His eleventh proposition of law is properly overruled.

CONCLUSION

Appellee submits jurisdiction is properly denied.

Respectfully,

Joseph T. Deters, 0012084P
Prosecuting Attorney

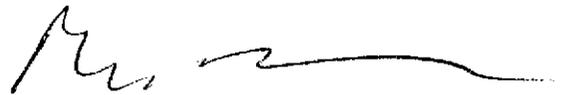


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CERTIFICATE OF SERVICE

I hereby certify that I have sent a copy of the foregoing Memorandum in Response, by United States mail, addressed to Christine Y. Jones (0055225), 114 E. 8th Street, Suite 400, Cincinnati, Ohio 45202, counsel of record, this 10 day of February, 2009.



Philip R. Cummings, 0041497P
Assistant Prosecuting Attorney