ORIGINAL

IN THE SUPREME COURT OF OHIO

10-1290

STATE OF OHIO	:	
Appellee	:	
-vs-	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Court of Appeals
VERNON BROWN	:	
Appellant	:	CA: 93007

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT VERNON BROWN

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TABLE OF CONTENTS

PAGES

THIS IS A FELONY CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION.....1

STATEMENT OF THE CASE AND FACTS 1

LAW AND ARGUMENT 5

Proposition of Law I: 5
THE ACCUSED'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO CONFRONT WITNESSES ALONG WITH HIS RIGHTS UNDER THE DUE PROCESS CLAUSE ARE VIOLATED WHEN THE TRIAL COURT PERMITS THE PROSECUTION TO INTRODUCE INADMISSIBLE HEARSAY EVIDENCE AT TRIAL

Proposition of Law II:.....8
THE ACCUSED'S RIGHT TO DUE PROCESS AND A FAIR TRIAL ARE VIOLATED WHERE THE PROSECUTION ELICITED IRRELEVANT AND UNFAIRLY PREJUDICIAL PROPENSITY EVIDENCE IN VIOLATION OF THE RULES OF EVIDENCE BARRING THE INTRODUCTION OF SUCH INFORMATION

Proposition of Law III: 9
THE TRIAL COURT VIOLATES THE ACCUSED'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHEN IT FAILS GIVE THE JURY AN INVOLUNTARY MANSLAUGHTER INSTRUCTION WHEN THE FACTS DEMONSTRATE SUCH AN INSTRUCTION IS WARRANTED.

Proposition of Law IV: 12
THE ACCUSED'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IS VIOLATED WHEN TRIAL COUNSEL FAILS TO OBJECT TO AN UNCONSTITUTIONAL SELF DEFENSE JURY INSTRUCTION OR PROPOSE AN ALTERNATE INSTRUCTION THAT DOES NOT IMPROPERLY SHIFT THE BURDEN OF PROOF TO THE DEFENDANT

CONCLUSION.....15

SERVICE.....16

APPENDIX
Entry declaring defendant indigent and appointing Public Defender on Appeal A1
Opinion from the Eighth District Court of Appeal A3

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

Mr. Brown submits four propositions of law for this Court's consideration. While all four are important, Mr. Brown's third proposition in particular warrants this Court's attention. Charged with murder and aggravated murder, Mr. Brown maintained that he committed the homicides, but that his actions had been necessitated by the need for self defense. Nevertheless, because of the way the evidence came in at trial, it was also possible that Mr. Brown's actions constituted voluntary manslaughter. Although instructions on both self defense and voluntary manslaughter were requested, the trial court refused to give the voluntary manslaughter instruction. On appeal, the Eighth District affirmed, finding that voluntary manslaughter and self defense are legally inconsistent defenses, and that a jury can never receive both instructions. *State v. Brown*, Cuyahoga App. No. 93007, 2010 Ohio 2460, ¶55. Given the evidence presented both instructions were legally and factually justified. The Eighth District's blanket pronouncement forbidding the simultaneous consideration of both defenses created a new rule of law with wide ranging implications for prosecutions throughout this state. Such a dramatic undertaking by an intermediate court warrants further scrutiny from this Court.

STATEMENT OF THE CASE AND FACTS

This matter stems from the January 1, 2004 shootings of Duane Roan and Tearle Toeran on Cleveland's west side. Vernon Brown was tried, convicted and sentenced to death in connection with that incident. On October 3, 2007, this Court reversed his capital murder conviction, vacated his death sentence, and remanded the case for a new trial. *State v. Brown* (2007), 115 Ohio St.3d 55.

The matter was retried on five indicted counts. Count One derived from Toeran's shooting and charged Mr. Brown with murder. Count Two pertained to the Roan shooting and

charged aggravated murder, the lesser included offense of murder, and course of conduct and felony murder death penalty specifications. Count Three charged aggravated robbery. Counts One through Three included one and three-year firearm specifications. Counts Four and Five charged carrying a concealed weapon and having a weapon under disability. The weapons under disability charge was tried to the bench.

The shootings took place on the night of January 1, 2004. Police arrived shortly and found the men lying outside of a house at 3252 West 52nd Street. Both were declared dead at the scene. Police found more than $7000.00 on Roan, and Toeran had approximately $400.00. Both men were carrying loaded handguns, and their hands tested positive for the presence of gunshot residue. Autopsies noted that Roan had been shot in the right jaw, right collarbone, right side of the lower chest and on the left buttock. Roan was 6'2" tall and weighed 282 pounds at the time of his death. A toxicology report indicated that his system contained marijuana. Toeran sustained a single gunshot wound just behind his right ear. He was 6'2" tall and weighed 210 pounds. His toxicology report indicated positive for cocaine.

At trial Mr. Brown did not dispute that he shot the two men. He maintained, however, that he did so in self defense. Brown testified that he killed Toeran and Roan because he believed they were about to kill him. Mr. Brown acknowledged that he occasionally purchased and sold drugs. His friend Jay, a.k.a. Jamill Williams, however, made a living in the drug trade and had helped him set up the transaction with Roan. Roan and Brown were not well acquainted. According to Brown, he had waited most of the day to complete the purchase. That evening Brown asked Jillian Wright to take him over to Jay's house, where he waited outside for Roan to arrive. Eventually, Roan and Toeran pulled up in a light colored car. Before getting in, Brown told Jill to wait while he completed the deal

Brown did not know Toeran and had not expected to deal with anyone other than Roan. When Brown voiced this concern to Roan, however, Roan advised that everything was cool and the drugs were Toeran's. Brown handed Roan the money and asked if he had a scale. Roan replied that he did not and at that point, Brown feared that he was being set up. According to Brown, drug dealers always carry a scale of some kind to assure the fairness of a transaction this size. To Brown, the absence of a scale was a deal breaker. Brown demanded his money back. Brown exited the car, followed by Roan and then Toeran. Brown again requested his money, to which Roan responded that he "did not come over [to the west side] for nothing." Mr. Brown noted that Toeran was holding an open bottle of wine in one hand and had the other hand in his pocket. Brown always carried a firearm for protection and he correctly assumed that Roan and Toeran were also armed.

At only 175 pounds, Brown was at a substantial physical disadvantage against both men. Toeran was standing very close. About a minute passed before Brown saw Roan pull his gun. Brown, who had already grasped the handle of his gun, pulled it out and shot Toeran while shoving him into Roan. Brown then ran into the yard, where he ducked for cover by a Toyota parked in the driveway at the side of the house. As he squatted by the car's right front tire, Brown heard footsteps on the gravel driveway. Roan came towards him from around the front of the car pointing a chrome .357 magnum and Brown shot him.

Jill had driven away during the skirmish, so Brown got in Roan's car and left. He parked the car in his mother's garage where it remained until the police found it later in the month. Brown believed that he had had no other choice when he shot Roan and Toeran, but he did not tell the authorities afterwards, because he had a criminal history, and he feared police would not believe him.

According to the prosecution, Roan and Toeran were victims of a calculated and well planned scheme by Brown, perhaps with Williams' assistance, to kill the men. The prosecution speculated that Mr. Brown and an accomplice – probably Williams - had planned to rob the decedents, but the accomplice had backed out of the enterprise at the last minute. The decedents were known drug dealers, and were carrying loaded firearms and large amounts of cash at the time of their demise.

The State's primary witness was Jillian Wright, who claimed to have witnessed the shootings. Ms. Wright drove Brown to the meeting with Roan and Toeran. Ms. Wright recalled that, after telling her to wait for him, Mr. Brown entered Roan's car. After a few minutes, Ms. Wright saw two men exit with their hands up. According to Wright, neither man had a weapon in their hands. Wright watched as Brown stepped out of the car holding a large black gun. It was dark and Wright could not hear what was said, but she saw Brown shoot one man in the back of the head. The other man, started to run away, and Wright heard three or four more shots before seeing him fall. Wright testified that Brown then walked over to the driver and shot him in the face.

Wright acknowledged that her versions of the incident have evolved since her first police interrogation on January 6, 2004. She acknowledged that charges initially pending against her related to this case were reduced in the wake of her agreement to testify. From the time of Mr. Brown's arrest until trial, he and Ms. Wright remained in contact. In some of those letters it is clear that Brown was trying to influence Ms. Wright and others to help him. Brown admitted writing the letters but noted that he had no intention of hurting anyone to prevent their testimony against him.

A jury found Mr. Brown not guilty of aggravated murder, but guilty of murder on both

shootings; guilty of robbery, and guilty on all other counts, including the firearm specifications. On February 25, 2009, the trial court sentenced Mr. Brown to consecutive terms of 15-years to life on the murder counts with consecutive three-year firearm specification terms for each murder, for an aggregate sentence of 36-years to life. The County Public Defender's Office appealed the verdict to the Eighth District Court of Appeals, which journalized a decision affirming the conviction on June 14, 2010. Mr. Brown now seeks leave from this Court to appeal that decision.

LAW AND ARGUMENT

Proposition of Law I:*THE ACCUSED'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO CONFRONT WITNESSES ALONG WITH HIS RIGHTS UNDER THE DUE PROCESS CLAUSE ARE VIOLATED WHEN THE TRIAL COURT PERMITS THE PROSECUTION TO INTRODUCE INADMISSIBLE HEARSAY EVIDENCE AT TRIAL*

The prosecution's case against Mr. Brown was essentially based on Jillian Wright's account, along with several vague admissions Mr. Brown allegedly made to a number of ne'er-do-wells with whom he associated at the time. Jamill Williams, Mr. Brown's close friend and the man who arranged the transaction that precipitated Roan and Toeran's deaths, did not testify. Nevertheless, he remained an important, albeit shadowy figure in the State's case. In the wake of the shooting, Mr. Brown allegedly made several damaging admissions to Williams about what had happened.

By the time the matter went to trial, however, Williams had disappeared. The parties stipulated that he was a fugitive. After introducing Wright's testimony, the prosecution called two individuals who claimed to have been acquainted with Vernon Brown. Both provided testimony implicating Brown in the shooting, but in doing so, they admitted acquiring the information from Williams - after the fact. Under the circumstances to the extent that they

provide evidence linking Mr. Brown to the shootings, that information was plainly second-hand, constituted hearsay, and was inadmissible. Further because the person from whom the information purportedly originated could not be cross-examined, the testimony violated the Confrontation Clause.

The State presented this hearsay evidence to the jury through Deshon Garrison and Christine Porter. Mr. Garrison, aka, Young Gunner, testified that, like Williams and Brown, he was dealing drugs at the time of the shooting. His career was cut short by a murder conviction arising out of an unrelated incident that occurred in March of 2004. Garrison also had a conviction for perjury. Garrison knew Roan well and had been a regular customer. He had planned to hook up with Roan to buy drugs on the night Roan died.

At the time of the shootings, Garrison was driving around the east side of Cleveland with Christine Porter looking for drugs because he had been unable to reach Roan. Over objection, Garrison testified that earlier in the day, Roan had told him he was planning to sell drugs to Mr. Brown that night. Garrison learned about the shooting the next day, first from his father, then later from Mr. Williams (who he referred to as "Capone"). Garrison testified that after talking to Williams he went to the police about the information he received. It was made clear to the jury that, police arrested Mr. Brown for the shootings based on the information Garrison provided.

Like Garrison, Christine Porter was nowhere near the shootings that night, had little acquaintance with Vernon Brown, and had no personal knowledge about what transpired. Porter was a frequent cocaine user who purchased her drugs from Williams (whom she called "Bishop") and Garrison. Porter gave a statement to police in February of 2004 essentially conveying what she had heard about the shooting from Williams and Garrison. In fact, Porter admitted at trial that everything she had heard about the shootings came from those two men.

Porter testified that Williams had told her that Mr. Brown told him that Roan had something coming to him for selling bad dope. Porter also testified that Mr. Brown had said, again this was secondhand through Williams, Roan and Toeran got what they deserved.

The Sixth Amendment's Confrontation Clause provides that in all criminal prosecutions, the accused has the right to be confronted with the witnesses against him. U.S. Const. amend. VI. That guarantee includes the right to cross-examine witnesses. *Pointer v. Texas*, (1965) 380 U.S. 400, 404 (applying the Sixth Amendment to the states through the Fourteenth Amendment). Cross-examination has been characterized as the 'greatest legal engine ever invented for the discovery of truth." *White v. Illinois* (1992), 502 U.S. 346, 356.

The Confrontation Clause is an affirmative guarantee that testimony introduced against an accused must be given under a prescribed procedure in the presence of the accused an subject to cross-examination. *Crawford v. Washington* (2004), 541 U.S. 36, 61. In this case, Mr. Williams had absented himself from the jurisdiction, rendering him unavailable as a witness. The State was not entitled to parade other witnesses, none of whom had direct personal knowledge of the shooting, to provide Mr. William's testimony in his absence.

Garrison and Porter's testimony also violates the rules governing the admissibility of evidence. These rules were established to provide a structure within which "the truth may be ascertained and proceedings justly determined. Evid. R. 102. Those rules explicitly bar the introduction of hearsay evidence, defining hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid. R. 801(C); 802. Art. I, Sect. 10 of the Ohio Constitution provides even greater protection of the confrontation rights of defendants than the Sixth Amendment of the United States Constitution. *State v. Storch* (1993), 66 Ohio St. 3d 280, 291.

Garrison and Porter's testimony concerning Williams' statements to them about Brown's statements to Williams about the shooting was inadmissible as hearsay – and as double hearsay. Under no circumstances was this evidence reliable or admissible. The Eighth District rejected Mr. Brown's claim that this evidence was improper, further concluding that it did not prejudice the jury against Mr. Brown. That decision was wrong and this Court should accept this appeal and correct this misapplication of clearly established state and federal precedent

Proposition of Law II:*THE ACCUSED'S RIGHT TO DUE PROCESS AND A FAIR TRIAL ARE VIOLATED WHERE THE PROSECUTION ELICITED IRRELEVANT AND UNFAIRLY PREJUDICIAL PROPENSITY EVIDENCE IN VIOLATION OF THE RULES OF EVIDENCE BARRING THE INTRODUCTION OF SUCH INFORMATION*

The state introduced the testimony of four witnesses who testified that, like Vernon Brown, they purchased or sold drugs on Cleveland city streets. As noted above Garrison and Porter also provided information they gathered about the shooting from a nontestifying third party. Leon Jackson another of these individuals testified about a statement he gave to police in March of 2004, wherein he claimed Brown had told him he shot the men because they had refused to pay him. Jackson also claimed that Brown had joked and bragged to him about the shootings. Reginald Harwell testified that he saw Brown at Williams' apartment on the night of the incident. Harwell went on to testify that both Brown and Williams carried gun, which each of them lovingly named. the prosecution used these witnesses to paint Brown as a crafty drug dealer and career criminal – the kind of man who associated with other gun-toting bad actors; and the kind of man who would name his gun, "Mike Tyson."

This was propensity evidence. It was irrelevant under Evid.R. 401, and inadmissible under Evid. R. 402 and *State v. Edmonds* (2000), 139 Ohio App. 3d 298, 300. Even if this evidence had been relevant, its introduction would nevertheless have been unfairly prejudicial

and improper under Evid. R. 403(A). This case was closely balanced. This propensity evidence was inadmissible, and it compromised the trial by prejudicing the jury against Mr. Brown.

***Proposition of Law III**:THE TRIAL COURT VIOLATES THE ACCUSED'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHEN IT FAILS GIVE THE JURY AN INVOLUNTARY MANSLAUGHTER INSTRUCTION WHEN THE FACTS DEMONSTRATE SUCH AN INSTRUCTION IS WARRANTED.*

The evidence presented warranted that the trial court instruct the jury on the inferior offense of voluntary manslaughter. Given the facts in this case, the trial court erred in failing to do so. Under R.C. 2903.03, a person commits the offense of voluntary manslaughter if he knowingly causes the death of another, "while under the influence of sudden passion or in a sudden fit of rage either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force . . ." A felony of the first degree, voluntary manslaughter is an inferior degree offense to murder. *State v. Tyler* (1990), 50 Ohio St.3d 24, 36. Where the record reflects evidence that the victim seriously provoked the shooting and that the serious provocation was reasonably sufficient to have incited the use of deadly force then the voluntary manslaughter instruction is called for.

In this case, Mr. Brown maintained that the shootings were legally justified because he acted in self defense. The jury found him guilty of murder. Nevertheless, the record contained substantial evidence that, even if not legally justifiable, the shootings were seriously provoked by the decedents. Before the case was submitted to the jury, defense counsel requested both self defense and voluntary manslaughter instructions. Only the self defense instructions were given, however. The trial court's failure to instruct the jury on the offense of voluntary manslaughter as well as self defense constitutes reversible error.

It is well settled that a defendant on trial for murder or aggravated murder who produces sufficient evidence of the mitigating circumstances set forth under R.C. 2903.03 is entitled to an

instruction on voluntary manslaughter if, under any reasonable view of the evidence, a reasonable jury could find that the defendant had established by a preponderance of the evidence the existence of one or both of the mitigating circumstances. *State v. Huertas* (1990), 51 Ohio St.3d 22, 31-32.

To be serious, provocation must be reasonably sufficient to bring on extreme emotional stress and the provocation must be reasonably sufficient to incite or to arouse the passions of an ordinary person beyond the power of their control. In determining whether the provocation was reasonably sufficient to incite the defendant into using deadly force, the Court must also consider the emotional and mental state of this defendant and the conditions and circumstances that surrounded him at the time. *State v. Shane* (1992), 63 Ohio St.3d 630, 635. Accordingly, the court must ascertain whether a particular defendant "actually was under the influence of sudden passion or in a sudden fit of rage." *Shane*, *supra* at 634. This analysis requires the fact finder to examine the subjective understanding of the defendant at the time.

As noted above, there was considerable evidence, including the objective physical evidence, testimony from State witnesses, and basic common sense, which impugned the State theory that this was a cold blooded execution. Brown maintained that he shot the men in self defense after Roan took $2,000.00 from him, refused to give it back, and pointed a loaded .357 magnum at him. Evidently concluding that Brown failed to meet his burden of proof for self defense, the jury found him guilty of murder. While Mr. Brown disputes that decision, he alternatively maintains that there was substantial evidence to prove, at the very least, that Roan provoked the shooting. The extent of Roan's provocation mitigated this offense and occasioned an instruction for voluntary manslaughter.

There was no dispute that the incident preceding the shooting involved the purchase and sale of cocaine. Nor was there any quarrel over the fact that Roan, Toeran and Brown were all armed. Garrison testified that Roan had been planning to sell drugs to Brown on the night of the shooting. Brown testified that, while he planned on buying drugs from Roan, he did not know him personally and Jay had arranged the transaction. Garrison confirmed that Roan did not know Brown, and that Williams had arranged the deal.

Brown testified that when he got inside the Mitsubishi he was surprised to find that Roan had brought Toeran, an additional person and one he had never met before. None of the State's witnesses contradict that fact. Accordingly, it is clear that on the night of the incident, Brown entered the Mitsubishi to complete a drug deal of substantial magnitude with two individuals he neither knew nor trusted. He also assumed - correctly – that both men were armed. After Brown handed $2,000.00 to Roan, Roan then apprised him of the fact that he did not have a scale to assure the weight of the drugs involved. Both Brown and Garrison testified that it was routine for drug purveyors to carry scales. When Brown decided to abort the deal – Roan refused to give him his money back. The fact that police subsequently found so much money on Roan lends support to Brown's claim that Roan had cheated him.

When Brown exited the Mitsubishi, Roan and Toeran quickly followed him out. Both men were over six feet tall and weighed in excess of two hundred pounds and they positioned themselves very close to Brown. Brown, who was much smaller, would have been extraordinarily skittish at this point. Even Jillian Wright acknowledged that the shooting didn't start until one of the men attempted to reach for something. It is also telling that Deshon Garrison, who had spoken to Roan the day before about the next day's deal, testified that Roan may have been planning to shoot Brown. Garrison testified that while he and Roan were talking

about the planned transaction, Roan was playing with his .357 magnum, saying that "somebody is going to get it." Jackson took him to mean the gun.

Accordingly, when Brown saw Roan's gun, it was entirely understandable, if not legally justifiable, for him to fire first. After all, even Officer Simone, who arrested Mr. Brown in this case, testified that approached Mr. Brown with his sidearm drawn and ready to fire "because he wanted to go home that night." The situation Mr. Brown faced was equally tense, and it is reasonable to infer based on this evidence that when Roan drew his weapon he provoked this unfortunate outcome. Given this scenario, a jury could have found Brown guilty of the inferior offense of voluntary manslaughter. There was evidence presented that Roan confronted Brown with a loaded firearm after cheating and bullying him out of a substantial amount of money. Certainly, this is evidence upon which a reasonable fact finder could conclude that the shooting was provoked.

When it concluded that this assignment of error lacked merit, the Eighth District held that a voluntary manslaughter instruction is not properly given when the defendant maintains self defense. *State v. Brown*, 2010 Ohio 2460, ¶¶ 54-55. Such a blanket proposition of law is unprecedented, wholly uncalled for – particularly given these facts, and this Court should accept this appeal to clarify an extraordinarily murky area of law.

Proposition of Law IV:*THE ACCUSED'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IS VIOLATED WHEN TRIAL COUNSEL FAILS TO OBJECT TO AN UNCONSTITUTIONAL SELF DEFENSE JURY INSTRUCTION OR PROPOSE AN ALTERNATE INSTRUCTION THAT DOES NOT IMPROPERLY SHIFT THE BURDEN OF PROOF TO THE DEFENDANT*

Trial counsel was ineffective for failing to object to the self defense instructions given to the jury. Those instructions violated the Sixth Amendment right to a jury trial in two distinct ways. First, the use of such conflicting jury instructions in a capital case (which this case was)

involving self-defense undermines the beyond a reasonable doubt requirement because jurors will be tempted to reconcile the conflicting instructions in favor of the State. Second, the court's failure to instruct the jury on all elements of the crime charged violates the Sixth Amendment.

With emerging frequency, the United States Supreme Court has emphasized the importance of the jury's role in criminal proceedings. See, *Apprendi v. New Jersey* (2000), 530 U.S. 466, *Ring v. Arizona* (2002), 536 U.S. 584; *Blakely v. Washington* (2004), 542 U.S. 296; and *Cunningham v. California*.(2007), 549 U.S. 270, to name only a few. This line of cases is generally recognized for the proposition that the Sixth Amendment right to a jury trial prohibits judges from enhancing criminal sentences based on facts other than those decided by the jury or admitted by the defendant.

This authority underscores the Supreme Court's renewed emphasis on the importance of juror's role in determining a defendant's fate beyond a reasonable doubt. The instructions used in Mr. Brown's case subverted the jury exclusive role as factfinder in his case.

The self defense instructions used in Brown's case also improperly shifted the burden of proof away from the prosecution and forced it on the defendant. Ohio is the only U.S. state that puts the burden of proof for self defense on the defendant. Everywhere else the prosecution must prove that the defendant's actions were not justifiable. The present statutory requirement, which places the burden of proof on the defendant violates the Sixth Amendment's jury trial guarantee. Further, because this was a capital case, requiring heightened reliability, such burden shifting violates the Eighth Amendment as well - both constitutional provisions having been made applicable to the states under the Fourteenth Amendment.

Under R.C. 2901.05(A), and *State v. Robinson* (1976), 47 Ohio St.2d 103, a criminal defendant has the burden of going forward with "evidence of a nature and quality sufficient to

raise the issue of self-defense, whereas the state retains the burden of proof or persuasion of proving each and every element of the offense with which that defendant is charged beyond a reasonable doubt. *Robinson*, supra, at 111, 112. Nevertheless, R.C. 2901.05(A) and Robinson's construction of that provision contradict the Due Process Clause, which requires the government to prove beyond a reasonable doubt every element of the crime with which the defendant is charged. *In re Winship* (1970) 397 U.S. 358, 364.

Indeed, a defendant must be acquitted when the court omits from the jury instructions any element that the prosecution must prove beyond a reasonable doubt. *United States v. Gaudin* (1995), 515 U.S. 506, 522-523. Due process further distinguishes between defenses of mitigation and those of justification – such as claims of self-defense. Defenses of mitigation such as heat of passion and duress create the distinction between murder and manslaughter. Self-defense, however, is a complete defense, which absolves all guilt. Because the prosecution's burden is always to prove guilt (including the element of criminal intent) beyond a reasonable doubt, that burden is lessened under the law's current structure. Undeniably then, the criminal intent of any felonious homicide is irreconcilable with self-defense. Therefore, requiring the accused to disprove criminal intent offends this fundamental criteria. *Issac v. Engle* (6th Cir. 1980) 646 F.2d 1129, 1136.

Currently, in Ohio a defendant in a capital case must prove his innocence by a preponderance of the evidence where he claims to have acted in self-defense. Such a scenario would appear to contravene the "Eighth Amendment's heightened need for reliability" where one's life is at stake. *Caldwell v. Mississippi* (1985), 472 U.S. 320, 340. Given that Mr. Brown's case involved a potential death sentence, the trial court had all the more reason to require the State of Ohio to prove, beyond a reasonable doubt, the absence of self-defense. All of Ohio's

sister states have made self-defense an element of the offense and required courts to instruct the jury accordingly.

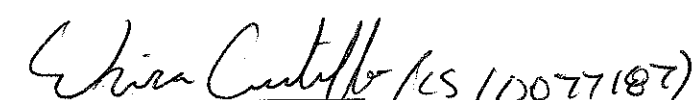
The Sixth Amendment does not permit a defendant to be "exposed . . . to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Apprendi, supra*, at 483. Consequently, sentencing factors that a judge may find in order to impose a harsher sentence are hereafter deemed elements of the offense. These must be proven to a jury beyond a beyond a reasonable doubt. *Id.* Ohio's treatment of self-defense as an affirmative defense – which forces the defendant to affirmatively prove it – compromises a juror's understanding of the burden of persuasion.

Trial counsel did not draw the trial court's attention to the constitutional violations engendered by Ohio's unique burden shifting requirement. Nor did counsel offer a counter instruction, properly placing the burden on the prosecution where it belonged. Counsel's lapses in this regard, handicapped Mr. Brown's ability to challenge Ohio's self-defense instruction, and its impact on his trial. Under the circumstances trial counsel was ineffective in violation of Mr. Brown's rights under the Sixth Amendment. *Wiggins v. Smith* (2003), 539 U.S. 510, 521.

CONCLUSION

For the foregoing reasons, Petitioner-Appellant Vernon Brown asks this Court to accept jurisdiction over this matter because it presents substantial questions of constitutional magnitude and general public interest.

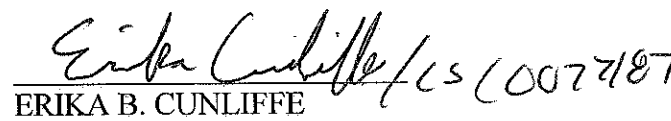
Respectfully Submitted,



ERIKA B. CUNLIFFE
Counsel for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum In Support of Jurisdiction was served upon WILLIAM D. MASON, ESQ., Cuyahoga County Prosecutor, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 on this 22nd day of July, 2010.



ERIKA B. CUNLIFFE
Assistant Public Defender

56117434

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

STATE OF OHIO
Plaintiff

VERNON BROWN
Defendant

2009 FEB 25 A 8: 55

GERALD E. FUERST
CLERK OF COURTS
CUYAHOGA COUNTY

Case No: CR-04-447563-ZA

Judge: JOSE` A VILLANUEVA

INDICT: 2903.02 MURDER /FRM1 /FRM3 /MM /FMS /NPC /RVOS
2903.01 AGGRAVATED MURDER /FRM1 /FRM3 /MM /FMS /NPC /RVOS
2911.01 AGGRAVATED ROBBERY W/FRM/REPEAT VS/NOTICE OF PC /FRM1 /FRM3 /NPC /RVOS
ADDITIONAL COUNTS...

JOURNAL ENTRY

DEFENDANT IN COURT. COUNSEL JEFFREY SAFFOLD & KEVIN SPELLACY PRESENT.
ADDITIONAL COUNSEL PROSECUTOR STEVE DEVER AND JOHN HANLEY PRESENT.
COURT REPORTER KATHLEEN KILBANE PRESENT.
ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF MURDER 2903.02 - WITH FIREARM SPECIFICATION - 1 YEAR (2941.141), FIREARM SPECIFICATION - 3 YEARS (2941.145) UNDER COUNT(S) 1 OF THE INDICTMENT.
ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF MURDER 2903.02 - WITH FIREARM SPECIFICATION - 1 YEAR (2941.141), FIREARM SPECIFICATION - 3 YEARS (2941.145) THE LESSER INCLUDED OFFENSE UNDER COUNT(S) 2 OF THE INDICTMENT.
ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF ROBBERY 2911.02 A(1) F2 WITH FIREARM SPECIFICATION - 1 YEAR (2941.141) UNDER COUNT(S) 3 OF THE INDICTMENT.
ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF CARRYING CONCEALED WEAPONS 2923.12 - F4 AS CHARGED IN COUNT(S) 4 OF THE INDICTMENT.
ON A FORMER DAY OF COURT, THE COURT RETURNED A VERDICT OF GUILTY OF HAVING WEAPONS WHILE UNDER DISABILITY 2923.13 - F3 UNDER COUNT(S) 5 OF THE INDICTMENT.
DEFENDANT ADDRESSES THE COURT.
THE COURT CONSIDERED ALL REQUIRED FACTORS OF THE LAW.
THE COURT FINDS THAT PRISON IS CONSISTENT WITH THE PURPOSE OF R. C. 2929.11.
THE COURT IMPOSES A PRISON SENTENCE AT THE LORAIN CORRECTIONAL INSTITUTION OF 36 YEARS TO LIFE.
THE COURT IMPOSES AN AGGREGATE SENTENCE OF 36 YEARS TO LIFE TO LCI AS FOLLOWS: AS TO COUNT ONE, DEFENDANT IS IMPOSED AN 15 YEAR TO LIFE MANDATORY SENTENCE PLUS A 1 AND 3 YEAR FIREARM SPECIFICATION, FIREARM SPEFICATIONS MERGE. THE 3 YEAR GUN SPECIFICATION IS TO BE SERVED FIRST AND CONSECUTIVELY TO THE 15 YEAR LIFE SENTENCE. AS TO COUNT TWO, DEFENDANT IS IMPOSED A 15 YEAR TO LIFE SENTENCE PLUS A 3 YEAR FOR THE GUN SPECIFICATION TO BE SERVED CONSECUTIVELY TO EACH OTHER AND TO COUNT ONE. THE 1 AND 3 YEAR GUN SPECIFICATION IN COUNT TWO MERGE BUT ARE SEPARATE FROM COUNT ONE. AS TO COUNT THREE, DEFENDANT IS IMPOSED A 2 YEAR PLUS A 1 YEAR SENTENCE FOR THE GUN SPECIFICATION CONSECUTIVELY BUT CONCURRENTLY TO COUNTS ONE AND TWO. AS TO COUNT FOUR, DEFENDANT IS IMPOSED A 1 YEAR SENTENCE TO RUN CONCURRENTLY TO ALL COUNTS. AS TO COUNT FIVE, DEFENDANT IS IMPOSED A 1 YEAR SENTENCE TO RUN CONCURRENTLY TO OTHER COUNTS. DEFENDANT IS GRANTED CREDIT FOR TIME SERVED. CUYAHOGA SHERIFFS DEPARTMENT TO CALCULATE CREDIT.
POST RELEASE CONTROL IS PART OF THIS PRISON SENTENCE FOR 5 YEARS MANDATORY FOR THE ABOVE FELONY(S) UNDER R.C.2967.28.
THE COURT DETERMINES THAT THE DEFENDANT DOES NOT QUALIFY FOR PLACEMENT INTO INTENSIVE PROGRAM PRISON.
DEFENDANT ADVISED OF APPEAL RIGHTS.

Lorain cost

SENT
02/23/2009

Sheriff Signature JM 2-26-09

CR 447563
VERNON BROWN

56117434

TRANSCRIPT AT STATE'S EXPENSE.
THE PUBLIC DEFENDERS OFFICE IS APPOINTED FOR PURPOSES OF APPEAL. PAY COURT COSTS. DEFENDANT REMANDED. SHERIFF ORDERED TO TRANSPORT.
DEFENDANT IS TO PAY COURT COSTS.
DEFENDANT REMANDED.
SHERIFF ORDERED TO TRANSPORT DEFENDANT VERNON BROWN, DOB: 07/20/1973, GENDER: MALE, RACE: BLACK.

02/23/2009
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Judge Signature Date

SENT
02/23/2009

Judy Villanueva

JUN 1 4 2010

Court of Appeals of Ohio

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FILED

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

2010 JUN 17 A 10: 17

GERALD E. FUERST
CLERK OF COURTS
CUYAHOGA CO.

FEE 3 TAXED

JOURNAL ENTRY AND OPINION
No. 93007

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

VERNON BROWN

A 482002

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-447563

BEFORE: Dyke, J., Gallagher, A.J., and Boyle, J.

RELEASED: June 3, 2010

JOURNALIZED: JUN 1 4 2010

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FILED

2010 JUN 17 A 10: 17

GERALD E. FUERST
CLERK OF COURTS
CUYAHOGA COUNTY

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FILED AND JOURNALIZED
PER APP.R. 22(C)

JUN 14 2010

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY_____ DEP.

CA09093007 63455652

ANNOUNCEMENT OF DECISION
PER APP.R. 22(B) AND 26(A)
RECEIVED

JUN X 3 2010

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY_____ DEP.

COPIES MAILED TO COUNSEL FOR
ALL PARTIES.-COSTS TAXED

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

ANN DYKE, J.:

Defendant Vernon Brown appeals from his convictions[1] for two counts of murder with firearm specifications, robbery with firearm specifications, carrying a concealed weapon, and having a weapon while under disability. For the reasons set forth below, we affirm.

On January 21, 2004, defendant was indicted pursuant to a five-count indictment in connection with the shooting deaths of Tearle Toeran and Duane Roan. In Count One, defendant was indicted for the aggravated murder of Toeran, with one-year and three-year firearm specifications, mass murder and felony murder specifications, a notice of prior conviction, and a repeat violent offender specification. Count Two set forth the same charges in connection with the shooting of Roan. Count Three charged defendant with aggravated robbery, with one-year and three-year firearm specifications, notice of prior conviction, and a repeat violent offender specification. Counts Four and Five charged defendant with carrying a concealed weapon. Count Five was later amended to charge defendant with having a weapon while under disability.

As the matter proceeded to trial, defendant indicated that he shot Toeran

[1] This appeals arises from a retrial, following the reversal of his conviction and death sentenced for the aggravated murder with prior calculation and design of Duane Roan and conviction for the murder of Tearle Toeran, aggravated robbery with firearm specifications, and two weapons violations. See *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, 873 N.E.2d 858.

VOL0706 PG0225

and Roan but did so in self-defense. The state's case established that Jillian Wright, who lived with defendant,[2] testified that, on January 1, 2004, she drove defendant in his black Escalade to the West 52nd Street home of James Donley, a.k.a. Jamill Williams, "Jay" or "Capone." About 20 minutes later, defendant called her and asked her to pick him up. When she arrived, a light colored vehicle pulled up. There were two individuals inside. Defendant told Wright to go home. She did not want to do so, and defendant insisted that she remain in the Escalade. Wright watched as defendant got into the back of the men's vehicle, which then drove slowly away. A short time later, she saw the two men get out of the car with their hands up, and defendant exit the vehicle with a gun. According to Wright, the men had nothing in their hands.

Wright next testified that defendant had his gun to the back of the man who had been seated in the front passenger seat. This individual then reached for something, and defendant shot him in the head. The man who had been driving the car then ran and defendant chased after him, firing his weapon. The man then fell on the ground shaking, and defendant stood over him and shot him in the face.

Wright fled in the Escalade and defendant fled in the vehicle that had

[2] Wright testified that she and defendant obtained a marriage license but did not get married. Defendant indicated that his brother had married them.

been driven by the two men. Wright became lost and defendant directed her to his mother's home on Superior Avenue. At this time, Wright observed the men's car in the garage.

Defendant changed his clothes and he and Wright drove one of defendant's other vehicles to West 32nd Street later that night and observed numerous police cars. A few days later, police arrived at the Wright's apartment and she gave them consent to search. At this time, police found drugs and ammunition, and a gun case. Wright told police that defendant was home with her at the time of the shootings. Wright indicated that this statement was a lie and that later, after she had been charged with various offenses, she made a statement implicating defendant in the shootings. Several months later, however, she changed her story to exonerate defendant, but she claimed that she did so because she believed that defendant would harm her.

Cleveland Police Officer Robert Beveridge, Det. Joseph Bovenzi, and Ret. Det. Harry Matlock testified that police quickly responded to the scene and observed Toeran's dead body partially on the sidewalk. A shell casing was recovered approximately one foot from Toeran's head. No weapons were in Toeran's hands and a Smith & Wesson 9 mm handgun containing twelve live rounds in the clip was in Toeran's coat pocket. He also had over $7,000.

Another dead body, later identified as Roan, was discovered in an adjacent

field. A gun handle was sticking out from the right waistband of his pants, and he had approximately $500. According to police, Roan had no weapon in his hands, and three shell casings were found near his body. Police later learned that Roan's weapon, a Starr 9mm revolver, was loaded with nine live rounds and one in the chamber.

Leon Jackson testified that he and defendant drove past a street memorial for Toeran and Roan. According to Jackson, defendant mocked the look on Roan's face when he was shot and stated that the men had shorted him and did not want to pay him so he "did what he had to do."

Christine Porter testified that she learned of the shootings from Donley, then spoke with defendant. According to Porter, defendant reportedly said that they were not his boys and they got what they deserved.

Deshon Garrison testified that he knew Donley, Roan, and Toeran from drug sales. Defendant carried a .45 that he called "Mike Tyson." Roan also carried a weapon but he was not certain whether Toeran did so. Garrison did not speak with defendant about the matter but did provide information to Det. Beveridge.

Dr. Joseph Felo, deputy coroner for Cuyahoga County, performed autopsies on the two victims. Toeran died from a gunshot wound to the back of his head behind the right ear. There was fouling, or gun smoke, and stippling,

or unburned gunpowder, around the entrance wound, indicating a muzzle-to-target distance of less than six inches.

Roan sustained five gunshot wounds: one to the right jaw; one to his right collarbone; one to the mid portion of his right side; one to the right side of his chest, and one to his left buttock. The sequence of the shots could not be determined. There were stipple wounds to the cheek and upper right eye area, indicating, with respect to the gunshot wound to the jaw area, a muzzle to body distance of 12" to 18".

Curtiss Jones, a forensic scientist with the Cuyahoga County Coroner's Office, testified that there was no trace metal reaction from Roan or Toeran's hands. The possible explanations for this test result are that they did not handle metal; they handled metal but are not "metal reactors"; or they handled metal but the evidence was lost. Roan had gunshot primer residue on his left hand and Toeran had it on both hands. Possible explanations for this test result are that they fired a weapon, they were in close proximity to a weapon being fired, or their hands came into contact with a surface containing gunshot primer residue.

Jones also examined Roan's clothing for trace evidence. According to Jones, the front shoulder area of Roan's shirt was an entrance wound, based upon the "wipe off rim" of the mark. A Griess test for nitrates indicated that the muzzle-to-target distance was one to two feet. A second entrance wound was at

the flank or area below Roan's arm. The Griess test results indicate, based upon the nitrates, that Roan was shot from a distance of three to four feet. A third entrance wound was found on the rear, left of midline, and based upon the absence of nitrates, was inflicted from at least four feet away.

After receiving a tip in this matter, police began surveillance of defendant. Independent of this, Cleveland Police Det. James Simone observed the Escalade with improper plates and decided to tow the car. Simone then noticed the surveillance and the officers converged upon defendant and arrested him just after he got into the Escalade and prepared to drive away. At this time, defendant had a gun and keys to the vehicle driven from the scene of the shooting.

Bullets recovered from the autopsies in this matter were linked to defendant's gun, and shell casings from the scene also matched this weapon. In addition, police examined a pair of defendant's boots. Material on the sole of one of the boots had a mixture of DNA profiles, from which Toeran could be excluded as a contributor but Roan could not be excluded as a contributor. The car driven from the shootings, a Mitsubishi Diamante, was also located and drugs were uncovered from an area beneath the dashboard. In addition, the state presented evidence that defendant wrote a number of letters to Wright and others regarding the shootings.

Carmello Cruz testified that he heard voices arguing, and then heard two gunshots. A short time later, he heard several other gunshots. The next day, he observed defects in the back of his house that appeared to be bullet holes, which he then repaired. He acknowledged that he heard the shots in the front of his house, not the back, and that there appeared to be a greater number of holes to the house than shots fired the previous night. Retired Det. Harry Matlock testified that he viewed the defects on the Cruz home and did not observe bullets. He opined that the holes were unrelated to the incident under investigation and were older defects. Det. David Stokes testified that he examined the defects, removed the putty that had been used to repair them, and did not observe any bullets.

Defendant elected to present evidence. He presented the testimony of Grace Cardone, who stated that she heard what sounded like fireworks, which were followed by a short period of silence, then a second sound of fireworks. Her husband subsequently called police.

Defendant testified that he and Donley sold drugs, and that they arranged to meet with Roan in order to buy approximately $2,850 in drugs. Donley subsequently left and defendant called Wright to pick him up. After Wright returned, Roan and another man arrived. Defendant had Wright remain in the Escalade and he got into the back seat of the car in which Roan and the other

VOL 0706 PG 0231

man were driving. According to defendant, Roan did not have a scale to measure the drugs and defendant stated that he wanted his money back. Defendant stated that he knew that Roan carried a weapon, so he ordered the men out of the car. Toeran had his hand in his pocket and Roan pulled out a gun. Defendant then pushed Toeran into Roan and fired his gun. Defendant then ran to the adjacent yard and heard gunshots. Defendant stated that he was being shot at and that Roan pursued him. As Roan got close, defendant shot him, doing so in self-defense.

Defendant was subsequently convicted of two counts of the lesser included offense of murder, with the firearm specifications, robbery with firearm specifications, and carrying a concealed weapon. The trial court convicted him of having a weapon while under disability. The trial court then imposed an aggregate sentence of 36 years to life imprisonment. Defendant now appeals and assigns six errors for our review.

For his first assignment of error, defendant argues that the trial court violated defendant's constitutional right to confront witnesses when it permitted the state to introduce testimony from Deshon Garrison and Christine Porter. According to defendant, the testimony of these witnesses included hearsay statements from Jay Donley, a.k.a. Jamill Williams, who did not testify.

The Confrontation Clause guarantees a criminal defendant the right "to

be confronted with the witnesses against him." U.S. Const. Amend. VI.

In *Crawford v. Washington* (2004), 541 U.S. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177, the Supreme Court of the United States held that the Confrontation Clause bars the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." [3]

The *Crawford* Court declined to provide an exhaustive definition of "testimonial." It stated that the term encompasses, at a minimum, statements arising from preliminary hearings, grand jury investigations, previous trials, and police interrogations. Id. at 53, 124 S.Ct. 1354, 158 L.Ed.2d 177. The *Crawford* Court further recognized that statements "made under circumstances which would lead an objective witness to reasonably believe that the statements would be available for use at a later trial" are testimonial.

Deshon Garrison

In this matter, defendant complains that the state introduced Donley's hearsay statements about the shootings through the testimony of Garrison and

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[3] Jamill Williams was also known as Jay Donley, and Jay Donley testified, subject to cross-examination, during the first trial as follows:

Defendant told Donley that he "got them. He * * * got Maggot. * * * [S]crew them. * * * [T]hey ain't going to do nothing." See *State v. Brown,* 115 Ohio St.3d 55, 2007-Ohio-4837, 873 N.E.2d 858.

During the second trial, the parties stipulated that Donley was a fugitive.

thus "treated Williams [Donley] as an accomplice to this murder." We have extensively reviewed this testimony, however, and we conclude that Garrison testified that he learned about the shootings through his father. Garrison then informed the police about the kind of gun that defendant carried. We therefore cannot accept the claim that the state elicited Donley's out-of-court statements implicating defendant through the testimony of Garrison.

In any event, "[t]he [Confrontation] Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford v. Washington,* supra, at fn. 9. Here, the essence of Garrison's testimony was simply that he received some hearsay information about the homicides that he then conveyed to the police. The testimony was offered, essentially, to demonstrate the manner in which defendant became the focus of the police investigation into the double shooting. Since it was offered to explain the actions of a witness to whom the statement was directed, i.e., police officer's conduct while investigating a crime, rather than for the truth of the statement, is not hearsay. *State v. Thomas* (1980), 61 Ohio St.2d 223, 232, 400 N.E.2d 401.

Finally, even if we were to accept the claim that Garrison was permitted to offer hearsay regarding the fact that defendant and Roan had a meeting wherein defendant was going to purchase drugs, and the deal went awry, we

must conclude that defendant was not prejudiced by this evidence, as defendant admitted these matters but claimed that he shot the men in self-defense.

Christine Porter

Christine Porter testified that, after learning of the shootings, she overheard Donley, whom she knew as Bishop, speaking with defendant about the shootings. She then spoke to defendant and defendant told her that the men "got what they deserved." She later made a statement to police about the matter.

Porter's testimony contained admissions of a party-opponent that are not hearsay. See Evid.R. 801(D)(2). Moreover, "the Confrontation Clause is simply inapplicable when the 'witness' is the accused himself." *State v. Lloyd,* Montgomery App. No. 20220, 2004-Ohio-5813.

In addition, even if we were to accept the claim that Porter's testimony elicited impermissible hearsay, the evidence is not prejudicial as defendant admitted that he planned a drug deal that did not go as he had intended. Defendant admitted that he shot the men, but claimed that he did so in self-defense.

This assignment of error is without merit.

In his second assignment of error, defendant complains that the trial court violated his right to due process and a fair trial by permitting the state to elicit

irrelevant and prejudicial testimony that defendant was a drug dealer, carried a gun that he named "Mike Tyson," associated with other drug dealers, and laughed and joked about the shootings.

The admission of evidence rests within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343, paragraph two of the syllabus. Accordingly, we review the trial court's decision for an abuse of discretion. *State v. Martin* (1985), 19 Ohio St.3d 122, 483 N.E.2d 1157.

Evid.R. 404(B) provides that:

"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."

R.C. 2945.59 similarly provides that:

"In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake of accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto,

notwithstanding that such proof may show or tend to show the commission of another crime by defendant."

With regard to the evidence that defendant was a drug dealer, that he associated with drug dealers and carried a weapon, we remain mindful that defendant testified to these matters directly, so we cannot conclude that the trial court abused its discretion in permitting evidence as to these matters. As to defendant naming the weapon, and reportedly laughing and joking about the incident, we find this evidence relevant to defendant's intent, scheme or plan in meeting with Toeran and Roan. This evidence also refutes defendant's claim that the shootings occurred as the result of the two men attacking defendant and placing him in fear for his life. Cf. *State v. Perez,* 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104 (evidence of defendant's flippant attitude just after the murder was admissible).

The second assignment of error is without merit.

For his third assignment of error, defendant asserts that his convictions are against the manifest weight of the evidence. More specifically, defendant asserts that the evidence demonstrated that he shot Toeran and Roan in self-defense.

In evaluating a challenge to the verdict based on the manifest weight of the evidence, this court must review the entire record, weigh the evidence and

all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in evidence, the trial court clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *State v. Thompkins,* 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541.

To establish self-defense, the defendant must show the following elements: (1) the slayer was not at fault in creating the situation giving rise to the affray; (2) the slayer has a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force; and (3) the slayer must not have violated any duty to retreat or avoid the danger. *State v. Robbins* (1979), 58 Ohio St.2d 74, 388 N.E.2d 755, paragraph two of the syllabus; *State v. Dykas*, Cuyahoga App. No. 92683, 2010-Ohio-359. If any one of these elements is not proven by a preponderance of the evidence, the theory of self-defense does not apply. *State v. Williford* (1990), 49 Ohio St.3d 247, 551 N.E.2d 1279.

In this matter, the evidence demonstrated that defendant got into the Mitsubishi, ordered the men out of the car, and shot Toeran in the head, just behind his right ear. The evidence further demonstrates that defendant shot Roan four times, including in his buttocks, side, shoulder, and face. Defendant then fled in Toeran's Mitsubishi, and hid it at his mother's home. Defendant

does not dispute that he shot the men and fled in Toeran's car, and does not dispute that he had a weapon despite a 1992 aggravated robbery conviction. We therefore cannot say that the convictions are against the manifest weight of the evidence.

Turning to the issue of whether there is "justification for admitted conduct," *State v. Martin,* supra; *State v. Poole,* supra, the greater weight of the evidence indicated that defendant was at fault in creating the situation giving rise to the affray as he ordered the men out of the car at gunpoint. The greater weight of the evidence also indicated that defendant did not have a bona fide belief that he was in imminent danger of death or great bodily harm as Toeran's gun remained in his pocket and Roan's gun remained in his waistband, and Toeran was shot in the back of the head. The greater weight of the evidence indicated that defendant violated a duty to retreat or avoid the danger as he chased Roan down and shot him multiple times.

Although defendant insisted that Toeran and Roan were the aggressors, there was no evidence that they grabbed their weapons. Despite defendant's claims that they shot at him, thus creating the defects in Cruz's house, the evidence demonstrated that neither man reacted to the trace metal test. Although this does not definitively establish that they did not aim their guns at defendant, additional evidence demonstrated that Toeran's loaded gun remained

in his pocket, and Roan's loaded gun remained in his waistband. In addition, no bullets were found within Cruz's home and there were no shell casings linked to Toeran's and Roan's guns.

Moreover, the nature of the shots to Toeran and Roan undermines the claim of self-defense as Toeran was shot in the back of his head, behind his ear, and Roan was shot in numerous parts of his body, including his buttock, and a close range shot to the face, both of which are contrary to the claim that Roan placed defendant in imminent fear for his life. Further, the evidence regarding the wounds to Toeran and Roan is consistent with the testimony of Wright who stated that defendant exited the Mitsubishi with a gun drawn, the two passengers had their hands up, and defendant shot one man in the head as he reached for something, and shot the other man after chasing him down.

In accordance with the foregoing, we are unable to conclude that defendant established the justification of self-defense by a preponderance of the evidence. His convictions are not against the manifest weight of the evidence, and the third assignment of error is without merit.

In his fourth assignment of error, defendant asserts that the trial court erred in refusing to instruct the jury on the offense of voluntary manslaughter.

In reviewing a trial court's refusal to give a jury instruction, the appellate court must determine whether, under the facts and circumstances of the case,

VOL0706 PG0240

the trial court abused its discretion. *State v. Wolons* (1989), 44 Ohio St.3d 64, 541 N.E.2d 443.

In *State v. Loyed,* Cuyahoga App. No. 83075, 2004-Ohio-3961, this court held that the trial court properly refused to give an instruction on voluntary manslaughter, where the defendant claimed that he acted in self-defense. This court stated:

"[T]he court did not err by refusing to instruct on the lesser included offense of voluntary manslaughter because the requested instruction was incompatible with Loyed's theory of self-defense. In *State v. Harris* (1998), 129 Ohio App.3d 527, 534-535, 718 N.E.2d 488, the court of appeals stated:

"'Appellant incorrectly contends that the same evidence that supported his claim of self-defense and defense of others also supported his request for an instruction on voluntary manslaughter. As noted above, voluntary manslaughter requires that the defendant be under the influence of sudden passion or a fit of rage. Thus, this court has held that 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. See *State v. Tantarelli,* 1995 Ohio App. LEXIS 2186 (May 23, 1995), Franklin App. No. 94APA11-1618, unreported (1995 Opinions 2144, 2151) (testimony that defendant was dazed, confused, and scared

was insufficient to show sudden passion or fit of rage); *State v. Thompson,* 1993 Ohio App. LEXIS 1198 (Feb. 23, 1993), Franklin App. No. 92AP-1124, unreported (1993 Opinions 485, 489) ('Self defense on the one hand requires a showing of fear, whereas voluntary manslaughter requires rage.').

"* * *'

"A jury instruction on a lesser included offense 'is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense.' *State v. Thomas* (1988), 40 Ohio St.3d 213, 533 N.E.2d 286, paragraph two of syllabus. As Harris makes clear, self-defense requires that the defendant show evidence of fear, while voluntary manslaughter requires that the defendant show evidence of sudden passion or fit of rage. It must be one or the other. The court did not err by finding that Loyed could not assert both."

In accordance with the foregoing, the trial court properly declined to instruct the jury on the offense of voluntary manslaughter as there was no evidence that defendant acted with a sudden passion or fit of rage, and this offense is not compatible with defendant's claim of self-defense.

The fourth assignment of error is without merit.

Defendant's fifth assignment of error challenges the trial court's instructions on self-defense. Defendant maintains that the trial court

improperly shifted the burden of proof to him to establish this defense. He additionally maintains that his attorneys were ineffective for failing to propose an instruction that required the state to establish the "absence of self-defense" as an element of the crime.

Pursuant to R.C. 2901.05, the burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.

In *State v. Martin* (1986), 21 Ohio St.3d 91, 488 N.E.2d 166, the Supreme Court described the nature of a claim of self-defense as follows:

"This court, in *State v. Poole* (1973), 33 Ohio St.2d 18, 19, 294 N.E.2d 888 [62 O.O.2d 340], characterized the defense of self-defense as a 'justification for admitted conduct.' Self-defense represents more than a 'denial or contradiction of evidence which the prosecution has offered as proof of an essential element of the crime charged * * *.' Id. Rather, we stated in *Poole*, this defense admits the facts claimed by the prosecution and then relies on independent facts or circumstances which the defendant claims exempt him from liability. Id."

The *Martin* court therefore held that the burden of proving self-defense by a preponderance of the evidence does not require the defendant to prove his innocence by disproving an element of the offense with which he is charged, as the elements of the crime and the existence of self-defense are separate issues

and self-defense seeks to relieve the defendant from culpability rather than to negate an element of the offense charged.

R.C. 2901.05 in turn was analyzed by the Supreme Court of the United States in *Martin v. Ohio* (1987), 480 U.S. 228, 107 S.Ct. 1098, 94 L.Ed.2d 267. That Court held that R.C. 2901.05(A) did not shift to the defendant the state's burden of proving each and every element of an offense beyond a reasonable doubt, which would have violated the Due Process Clause, and stated:

"[E]vidence offered to support the defense may negate a purposeful killing by prior calculation and design, but Ohio does not shift to the defendant the burden of disproving any element of the state's case. When the prosecution has made out a prima facie case and survives a motion to acquit, the jury may nevertheless not convict if the evidence offered by the defendant raises any reasonable doubt about the existence of any fact necessary for the finding of guilt. Evidence creating a reasonable doubt could easily fall far short of proving self-defense by a preponderance of the evidence. Of course, if such doubt is not raised in the jury's mind and each juror is convinced that the defendant purposely and with prior calculation and design took life, the killing will still be excused if the elements of the defense are satisfactorily established. We note here, but need not rely on, the observation of the Supreme Court of Ohio that '[a]ppellant did not dispute the existence of [the elements of aggravated murder],

but rather sought to justify her actions on grounds she acted in self-defense.'"

Accord *State v. McGee,* Mahoning App. No. 07 MA 137, 2009-Ohio-6397; *State v. Middleton* (July 6, 1993), Montgomery App. No. 07 MA 137.

Further, because there is no basis for including the absence of self-defense as an element of the offense, defendant's trial counsel did not commit an error in failing to request such an instruction, and claim of ineffective assistance of counsel, which is based upon this contention, must likewise fail. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.

In accordance with all of the foregoing, this assignment of error is without merit.

For his final assignment of error, defendant challenges the trial court's "reasonable doubt" instruction, and argues that the instruction given actually sets forth the lesser standard of "clear and convincing evidence."

R.C. 2901.05(E) defines "reasonable doubt" as follows:

"(E) 'Reasonable doubt' is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. 'Proof beyond a reasonable doubt' is proof of such character

that an ordinary person would be willing to rely and act upon it in the most important of the person's own affairs."

In this matter, the instruction given to the jury tracked this statute and provided as follows:

"Reasonable doubt is present when, after you have carefully considered and compared all the evidence, you cannot say you are firmly convinced of the truth of the charge. Reasonable doubt is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs depending on moral evidence is open to some possibility or imaginary doubt. Proof beyond a reasonable doubt is a proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs."

Defendant insists that the "firmly convinced" language represents only the clear and convincing evidence standard, and not the beyond a reasonable doubt standard. We note, however, that the Ohio Supreme Court has approved the use of the statutory definition of reasonable doubt in jury instructions. See *State v. Awkal* (1996), 76 Ohio St.3d 324, 667 N.E.2d 960. Accord *State v. Gross* (May 24, 1999), Muskingum App. No. CT 96-055.

This assignment of error is therefore without merit.

Affirmed.

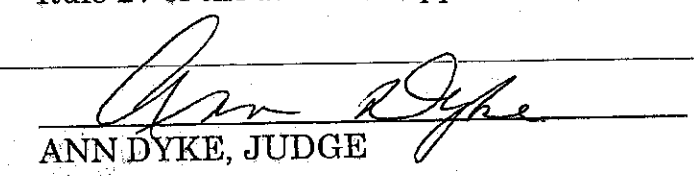
VOL 0706 PG 0246

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



ANN DYKE, JUDGE

SEAN C. GALLAGHER, A.J., CONCURS;
MARY J. BOYLE, J., CONCURS IN JUDGMENT ONLY