

ORIGINAL

IN THE SUPREME
COURT OF OHIO

11-0595

STATE OF OHIO
APPELLEE

APP. CASE NO. 10CA009758

V.

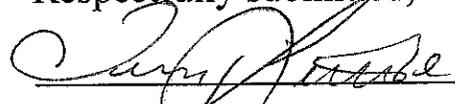
TRIAL NO. 07CR074162

TERRY L. LITTLE
APPELLANT

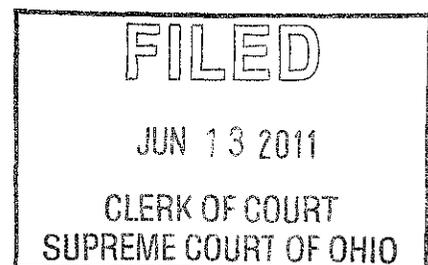
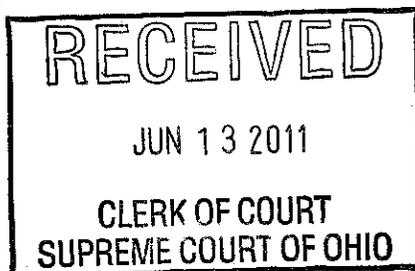
MOTION TO HOLD AND ABEYANCE

Now comes appellant Terry L. Little moves this honorable court to set aside appeal to this court, according to s. ct. Prac. R. 2.2. (A)(3)(a). Due to the fact that Appellant has a 26(B) motion into the Ninth District Appellate court which is currently being decided, which would be my guess. April 14th 2011 I received the prosecutors brief.

Respectfully submitted,

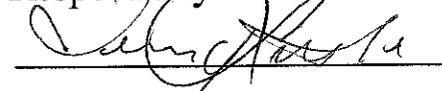


BY: TERRY L. LITTLE #562207
LECI
P.O. BOX 56
LEBANON OHIO 45036



Appellant filed a 26(B) because he believed his Appellate Attorney purposely didn't raise serious issues on appellate appeal. Issues that could have gotten Appellants case overturned. These arguments appellant asked appellate attorney to raise these issues but he never responded. Appellant ask this court sincerely to hold his **SUPREME COURT OF OHIO** appeal until the Ninth District decides on his 26(B) motion. It was appellants intention to file this motion prior to this with his notice appeal at the time it was sent back for not meeting reasonable standards, he admits he panicked when his appeal was sent back with the motion to hold and abeyance. So he immediately filed his Delayed appeal motion attached to the notice appeal. Appellant ask this court to take this motion into great consideration and grant this motion to stay since he haven't filed his memorandum in support of jurisdiction.

Respectfully submitted



TERRY L. LITTLE 562207
LEBANON CORR. INST.
P.O. BOX 56
LEBANON OHIO 45036

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion to hold and abeyance was forwarded by regular U.S. Mail to Mary R. Slanczka, prosecuting attorney, Lorain county, 225 court strret 3rd floor, Elyria Ohio 44035, this 8 day of June, 2011

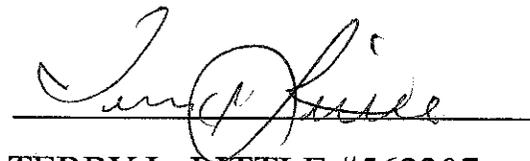
Terry C. Little

Terry C. Little

DEFENDANT-APPELLANT, PRO SE

CONCLUSION

For the stated reason set forth this honorable court should except this motion.

A handwritten signature in black ink, appearing to read "Terry L. Little", is written over a horizontal line.

TERRY L. LITTLE #562207
LECI
P.O. BOX 56
LEBANON OHIO 45036

DEFENDANT-APPELLANT, PRO SE

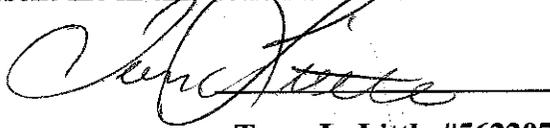
STATE OF OHIO

ss: Affidavit of Terry Little

COUNTY OF WARREN OHIO

I, Terry L. Little, having been duly sworn and cautioned upon my oat, as required by law, under penalty of perjury do hereby depose and say that the following is both true and correct:

1. That all facts, averments and statements as set forth in this motion to hold and abeyance are true and correct
2. That I am without the necessary means, funds, personal property real or otherwise, with which to retain counsel to represent me in this action and that I am true indigent within the meaning of the law.



Terry L. Little #562207
Appellant, PRO SE

Sworn to and subscribed in my presence this 9 th day of June ~~March~~ 2011.


NOTARY PUBLIC

BILLY DEE BAILEY
NOTARY PUBLIC • STATE OF OHIO
Recorded in Butler County
My commission expires Mar. 27, 2015



IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs.

Case No. _____

Terry Little

Defendant-Appellant.

AFFIDAVIT OF INDIGENCY

I, Terry Little, do hereby state that I am without the necessary funds to pay the costs of this action for the following reasons:

I am currently incarcerated at the LECI and I have been incarcerated since ~~2007~~ ²⁰⁰⁷. I work at the prison but receive only \$16 dollars per month.

Pursuant to Rule XV, Section 3, of the Rules of Practice of the Supreme Court of Ohio, I am requesting that the filing fee and security deposit, if applicable, be waived.

[Signature]
AFFIANT

Sworn to, or affirmed, and subscribed in my presence this 8th day of June, 2011

[Signature]
Notary Public
My Commission Expires: 3-27-15

BILLY DEE BAILEY
NOTARY PUBLIC • STATE OF OHIO
Recorded in Butler County
My commission expires Mar. 27, 2015



[Note: This affidavit must be executed not more than one year prior to being filed in the Supreme Court in order to comply with S. Ct. Prac. R. XV, Sec. 3.]

COURT OF APPEALS

STATE OF OHIO

COUNTY OF LORAIN)
)ss:

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

COUNTY OF LORAIN

2011 FEB 22 P 1:19

STATE OF OHIO

C.A. No. 10CA009758

Appellee

9th APPELLATE DISTRICT

v.

TERRY L. LITTLE

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 07CR074162

Appellant

DECISION AND JOURNAL ENTRY

Dated: February 22, 2011

WHITMORE, Judge.

{¶1} Defendant-Appellant, Terry Little, appeals from his convictions in the Lorain County Court of Common Pleas. This Court affirms.

I

{¶2} On the evening of July 30, 2007, Little entered a McDonald's restaurant on Oberlin Road and shot the victim in this case, Lewis Turner, in the back with a .380 caliber semi-automatic pistol. Little then fled McDonald's on foot and crossed over to the adjacent parking lot. Turner followed and a fray ensued. Little ultimately shot Turner twice with a .22 caliber semi-automatic pistol. Thereafter, Little took Turner's cell phone and the two firearms and ran. He discarded his hooded sweatshirt in a nearby dumpster and the firearms in the bushes of a nearby residence. Turner died in the parking lot as a result of his gunshot wounds.

{¶3} While patrolling the area shortly after the shooting, Officer Orlando Perez saw an individual who matched the description one witness gave of a man who had fled the scene.

AFFIDAVIT

State of Ohio)
) ss:
County of WARREN)

I, TERRY L. LITTLE, swear that the following is true:

1. I sent my Appeal out in a
timely manner.

2. It was sent 3-27-11, which I
felt I had enough time to be filed. It was
sent back, 4-6-11 which is the day
I received it.

3. Because my legal resources is limited
I had to get it out in a rush before
I missed deadline, is the why things were
out of place but everything was
appropriately in Appeals packet.

TERRY L. LITTLE 562207
NAME AND NUMBER

DEFENDANT-APPELLANT, PRO SE

Sworn to and subscribed in my presence this 6th day of April

20 A.

Billy Dee Bailey
NOTARY PUBLIC

BILLY DEE BAILEY
NOTARY PUBLIC - STATE OF OHIO
Recorded in Butler County
My commission expires Mar. 27, 2015



Officer Perez identified the man as Little and arrested him as the result of an active warrant. In searching Little incident to the arrest, Officer Perez discovered a bag of crack cocaine. Other officers later discovered the sweatshirt and firearms that Little discarded after fleeing the scene. Little ultimately admitted that he shot Turner in McDonald's because Turner had assaulted him a year earlier in relation to a drug transaction between the two of them.

{¶4} On August 16, 2007, a grand jury indicted Little on the following counts: (1) aggravated murder, in violation of R.C. 2903.01(A); (2) felonious assault, in violation of R.C. 2903.11(A)(2); (3) tampering with the evidence, in violation of R.C. 2921.12(A)(1); (4) having weapons while under disability, in violation of R.C. 2923.13(A)(3); (5) receiving stolen property, in violation of R.C. 2913.51(A); (6) murder, in violation of R.C. 2903.02(A); (7) murder, in violation of R.C. 2903.02(B); and (8) multiple attendant specifications related to Little's having a firearm during the commission of the foregoing offenses. An additional count of murder, in violation of R.C. 2903.02(B), and an additional attendant firearm specification were later added by way of supplemental indictment.

{¶5} Little initially pleaded not guilty by reason of insanity, but the court determined he was sane and competent for trial after a mental health evaluation took place. The matter proceeded to a jury trial on December 7, 2009. The State dismissed one of the murder charges at the beginning of trial and proceeded on the remaining seven counts. The jury ultimately found Little guilty of aggravated murder, felonious assault, tampering with evidence, having weapons while under disability, two counts of murder, and multiple firearm specifications. The trial court sentenced him to a total of thirty years to life in prison.

{¶6} Little now appeals from his convictions and raises three assignments of error for our review. For ease of analysis, we rearrange the assignments of error.

II

Assignment of Error Number Three

“THE VERDICTS ARE AGAINST THE SUFFICIENCY AND MANIFEST WEIGHT OF THE EVIDENCE AND SHOULD BE REVERSED BECAUSE THEY VIOLATE THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 10 OF THE CONSTITUTION OF THE STATE OF OHIO.”

{¶7} In his third assignment of error, Little argues that his guilty verdicts are based on insufficient evidence and are against the manifest weight of the evidence. Specifically, he argues that the evidence does not support the conclusion that he intended to kill Turner. We disagree.

{¶8} Initially, we note that while Little’s captioned assignment of error could be construed as a challenge to all of his guilty verdicts, Little’s argument only pertains to his aggravated murder and murder verdicts. As such, we limit our review to those counts. See, generally, App.R. 16(A)(7).

Sufficiency

{¶9} In order to determine whether the evidence before the trial court was sufficient to sustain a conviction, this Court must review the evidence in a light most favorable to the prosecution. *State v. Jenks* (1991), 61 Ohio St.3d 259, 274. Furthermore:

“An appellate court’s function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.” *Id.* at paragraph two of the syllabus; see, also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386.

“In essence, sufficiency is a test of adequacy.” *Thompkins*, 78 Ohio St.3d at 386.

{¶10} R.C. 2903.01(A) provides, in relevant part, that “[n]o person shall purposely, and with prior calculation and design, cause the death of another[.]” “[T]he phrase ‘prior calculation

and design' *** indicate[s] studied care in planning or analyzing the means of the crime as well as a scheme encompassing the death of the victim." *State v. Patel*, 9th Dist. No. 24030, 2008-Ohio-4693, at ¶33, quoting *State v. Taylor* (1997), 78 Ohio St.3d 15, 19.

"A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature." R.C. 2901.22(A).

The foregoing offense constitutes aggravated murder. R.C. 2903.01(F).

{¶11} R.C. 2903.02 defines the offense of murder. Specifically, R.C. 2903.02(A) prohibits any person from "purposely caus[ing] the death of another." Similarly, R.C. 2903.02(B) provides that "[n]o person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree[.]" See, also, R.C. 2901.01(A)(9) (defining the phrase "offense of violence").

{¶12} Doctor Paul Matus, the Lorain County Coroner, testified that he removed three bullets from Turner's body when he performed an autopsy. Before his death, Turner suffered gunshot wounds to the back, abdomen, and neck. While the back wound resulted from a .380 caliber bullet, the remaining two wounds stemmed from .22 caliber rounds. Doctor Matus described the gunshot to Turner's back as a near contact wound due to the presence of gun power residue, meaning that the shooter held the gun extremely close to Turner before firing. Doctor Matus described the bullet as having severed Turner's back muscles and opined that it would have been difficult for Turner to raise his arms after receiving that wound. Even so, Doctor Matus described Turner's back and abdomen wounds as non-fatal injuries and concluded that Turner died as a result of blood loss when the gunshot to his neck nicked a pulmonary artery. According to Doctor Matus, the shooter fired the gunshot to Turner's neck at a distance because

there was a lack of any gun powder or stippling around that injury. Doctor Matus also specified that all of Turner's wounds exhibited a downward path trajectory, meaning that the shooter fired at a downward angle. Doctor Matus testified that a downward path trajectory would not be present if both the shooter and the victim were standing upright.

{¶13} Sheila Lowe testified that she went to the McDonald's drive-thru on the night of the shooting with her boyfriend. Lowe recalled seeing a man in a hooded sweatshirt sitting on the curb before the car pulled around the drive-thru. According to Lowe, the man's sweatshirt had lettering on it that appeared to spell out "Levi." As a McDonald's employee handed Lowe and her boyfriend their purchase, Lowe heard a loud noise. Lowe learned there had been a shooting on the other side of the restaurant and used her cell phone to call 911.

{¶14} Julia Thomas, the McDonald's shift manager on the night in question, testified that she saw a man wearing a hooded sweatshirt and long jean shorts approach the McDonald's Playland area where two other men were sitting at a table. Thomas told the man the Playland area was closed, but he ignored her and entered the area. A few seconds later, Thomas heard a "boom" and saw the same man with a gun in his hand. Thomas then saw the man exit the restaurant and head toward the parking lot next door. The two other men who had been in the Playland area then also ran outside, and Thomas soon heard another gunshot. She then saw the man in the hooded sweatshirt run toward the Blockbuster Video store behind McDonald's. Another McDonald's employee, Traci Nelson, also witnessed the incident and testified that she saw two men fighting in the parking lot before she heard two gunshots. After the gunshots, Nelson saw one man fall in the parking lot and the other man run towards the Blockbuster Video store.

{¶15} Sergeant Mark McCoy testified that he found a hooded sweatshirt in Blockbuster Video's dumpster. The sweatshirt had lettering on it that spelled out "Lewis" and subsequently tested positive for the presence of gun powder residue. Detective Ralph Gonzalez also canvassed the area where Little was arrested after the shooting and found two pistols, one of which was a .22 caliber and the other a .380 caliber, hidden in a bush behind a residence. Although the .22 caliber pistol was empty, the .380 pistol was loaded. According to Detective Gonzalez, the .380 pistol had a chambered round that appeared to have been misfired, as it was still intact in the chamber but had a firing pin impression on its bottom. Michael Roberts, a forensic scientist with the Bureau of Criminal Identification and Investigation ("BCI"), examined the firearms and confirmed that the chambered bullet was consistent with a misfire.

{¶16} In the course of the investigation, the police also uncovered a car parked at DiFrancisco's Garage, a business directly across the street from McDonald's. Detective Gonzalez testified that DiFrancisco's owner asked him about having the car towed because it had been there overnight. The police were able to trace the car to Little's girlfriend and found a piece of paper signed by Little in the car as well as some uneaten food from McDonald's. The police also discovered that the cell phone Little had with him at the time of his arrest was Turner's cell phone. Further, a BCI forensic analyst testified that she examined the fingernail scrapings taken from Turner during his autopsy and that Little could not be excluded as the source of DNA found in the scraping samples. Detective Mark Carpentiere identified both Little and Turner as individuals involved in the drug trade in the Lorain area. As previously noted, Little had a bag of crack cocaine on his person when officers arrested him.

{¶17} Little admits that he entered McDonald's intending to shoot Turner, but argues that he did not intend to kill him. Viewing the evidence in a light most favorable to the State, we

must conclude that the record contains sufficient evidence to support Little's aggravated murder and murder verdicts. A rationale juror could have concluded that Little decided to kill Turner at some point before he entered McDonald's. See *Taylor*, 78 Ohio St.3d at 20 (rejecting a bright-line approach for prior calculation and design and noting that "each case turns on the particular facts and evidence presented at trial"). The police located Little's vehicle directly across the street from McDonald's where Turner could have been clearly visible through the Playland area's all-glass exterior. The car contained McDonald's food, which is indicative of the fact that Little had gone to the restaurant first before deciding to return. Additionally, one witness saw Little sitting on the curb of the McDonald's shortly before he entered it and shot Turner. Although Turner only sustained one, non-fatal shot to his back before fleeing McDonald's, the evidence showed that the .380 caliber pistol used to shoot him contained a chambered, misfired bullet. Accordingly, the jury could have concluded that Little did not kill Turner with the .380 pistol in McDonald's simply because the pistol misfired the second time.

{¶18} Doctor Matus testified that all of the bullets he recovered from Turner's body traveled at downward trajectories and that the fatal shot to Turner's neck was fired at a distant enough range that it did not leave evidence of powder or stippling. Moreover, he testified that it would have been difficult for Turner to raise his arms after having sustained the shot to his back. While it is unclear who initially possessed the .22 caliber pistol used to kill Turner, the jury could have concluded that Little either possessed or gained possession of the pistol at some point and used it to intentionally kill Turner before taking his cell phone, and possibly crack cocaine, from him. Little's argument that his aggravated murder and murder convictions are based on insufficient evidence lacks merit.

Manifest Weight

{¶19} In determining whether a conviction is against the manifest weight of the evidence an appellate court:

“[M]ust review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

A weight of the evidence challenge indicates that a greater amount of credible evidence supports one side of the issue than supports the other. *Thompkins*, 78 Ohio St.3d at 387. Further, when reversing a conviction on the basis that the conviction was against the manifest weight of the evidence, the appellate court sits as the “thirteenth juror” and disagrees with the factfinder’s resolution of the conflicting testimony. *Id.* Therefore, this Court’s “discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.” *State v. Martin* (1983), 20 Ohio App.3d 172, 175; see, also, *Otten*, 33 Ohio App.3d at 340.

{¶20} Little argues that his aggravated murder and murder verdicts are against the manifest weight of the evidence because he did not intend to kill Turner. Little testified in his own defense and claimed that: (1) he only shot Turner because he wanted to cause him pain, not kill him; (2) he tried to leave the scene after the first shot, but Turner followed and attacked him in the parking lot; and (3) he only shot Turner because Turner had a gun and was raising his arm to shoot. On cross-examination, however, Little admitted that he repeatedly lied to the police during their investigation. Little first told the police he was not at the crime scene at all. When shown a video recording from McDonald’s on which he appeared, Little admitted he was at the restaurant, but said that a third party must have killed Turner in the parking lot after he, Little,

successfully ran away. Little then later changed his version of the events again and admitted that he shot Turner, but said it was in self-defense. Moreover, Little only admitted to shooting Turner once with the .22 caliber pistol. He claimed that when he shot, the gun must have dispensed two bullets. Little also repeatedly lied about the location of the firearms that he hid, admitting that he twice took the police to the wrong location to look for the firearms in an attempt to mislead them. Little also could not explain why, if he was actually attempting to flee after he first shot Turner, he ran toward the parking lot adjacent to McDonald's instead of across the street where he had parked his car. Finally, Little's claim that Turner was facing him head on when Little shot him was contrary to the medical evidence introduced by Doctor Matus.

{¶21} Given the foregoing, we cannot conclude that this is the exceptional case where the evidence weighs heavily against the verdicts entered. See *Martin*, 20 Ohio App.3d at 175. The jury simply chose to believe the State's version of the events. In light of the evidence presented and the fact that Little repeatedly lied to the police during the course of their investigation, it was not unreasonable for the jury to reach that conclusion. Little's argument that his aggravated murder and murder verdicts are against the manifest weight of the evidence lacks merit. Little's third assignment of error is overruled.

Assignment of Error Number One

"THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON SELF DEFENSE."

Assignment of Error Number Two

"THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE LESSER-INCLUDED OFFENSE OF VOLUNTARY MANSLAUGHTER AND INVOLUNTARY MANSLAUGHTER."

{¶22} In his first and second assignments of error, Little argues that the trial court erred by refusing to instruct the jury on self-defense as well as the offenses of voluntary and involuntary manslaughter. We disagree.

“This Court reviews a trial court’s decision to give or decline to give a particular jury instruction for an abuse of discretion under the facts and circumstances of the case. A trial court’s failure to give a proposed jury instruction is only reversible error if the defendant demonstrates that the trial court abused its discretion, and that the defendant was prejudiced by the court’s refusal to give the proposed instruction.” (Internal citations and quotations omitted.) *State v. Sanders*, 9th Dist. No. 24654, 2009-Ohio-5537, at ¶45.

An abuse of discretion means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

Self-Defense

{¶23} Self-defense is an affirmative defense, which a defendant must prove by a preponderance of the evidence. *State v. Gates*, 9th Dist. No. 24941, 2010-Ohio-2994, at ¶7. “[A] trial court need only instruct the jury on self-defense if the defendant has introduced sufficient evidence, which, if believed, would raise a question in the minds of reasonable [jurors] concerning the existence of such issue.” (Internal quotations and citations omitted.) *State v. Hatfield*, 9th Dist. No. 23716, 2008-Ohio-2431, at ¶8.

“In general, to establish self-defense, including self-defense involving deadly force, the defendant must prove that: (1) the defendant was not at fault in creating the situation giving rise to the affray; (2) the defendant 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 defendant must not have violated any duty to retreat or avoid the danger.” *Gates* at ¶7, quoting *State v. Tucker*, 9th Dist. No. 06CA0035-M, 2006-Ohio-6914, at ¶4.

“The failure of proof on any one of these elements negates the assertion of self-defense.” *State v. Howe* (July 25, 2001), 9th Dist. No. 00CA007732, at *2.

{¶24} By his own testimony, Little admitted that he entered McDonald's for the purpose of shooting Turner. He argues that once he fired a non-fatal shot, however, the affray ended and he retreated, in good faith, by leaving the restaurant. Little testified that he "pleaded with [] Turner not to hurt him" because after Turner chased him out to the parking lot Turner put him in a headlock, took his gun, and pointed it at him. Little claims that he only shot Turner because he was "defenseless" and Turner was going to shoot him.

{¶25} The other evidence presented at trial does not support Little's version of the events. Apart from the fact that Little initially told the police that he was not at McDonald's at all and then that he was not the person who shot Turner in the parking lot, the medical evidence alone contradicts Little's explanation of the events. Doctor Matus testified that all of the bullets he removed from Turner's body were fired at a downward angle, meaning that the shooter had a higher vantage point and did not fire while facing Turner head on. Doctor Matus also testified that because Turner's back muscles were severed as a result of the first gunshot, it would have been difficult for him to even raise his arms at that point. Further, the evidence showed that the .380 caliber pistol Little initially used to shoot Turner contained a misfired bullet. Thus, the court could have rejected Little's argument that he retreated in good faith after one shot and determined that Little only retreated because his pistol would not fire again.

{¶26} Little failed to present sufficient evidence that he did not create the situation giving rise to the affray or that he had a bona fide belief that was in "imminent danger of death or great bodily harm." *Gates* at ¶7. Accord *Hatfield* at ¶9. Consequently, the trial court did not err by refusing to instruct the jury on self-defense. See *Howe*, at *2.

Voluntary & Involuntary Manslaughter

{¶27} “[A] defendant charged with murder is entitled to an instruction on voluntary manslaughter when the evidence presented at trial would reasonably support both an acquittal on the charged crime of murder and a conviction for voluntary manslaughter.” *State v. Shane* (1992), 63 Ohio St.3d 630, 632. A person commits voluntary manslaughter when 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[.]” R.C. 2903.03(A). A trial court need not give a voluntary manslaughter instruction if the evidence shows that a defendant had sufficient time to “cool down” after being provoked. *State v. Huertas* (1990), 51 Ohio St.3d 22, 32.

{¶28} Little argues that the trial court erred by refusing to instruct the jury on voluntary manslaughter because Turner’s actions against him constituted adequate provocation and he subjectively felt provoked when he saw Turner at McDonald’s. Voluntary manslaughter also requires, however, proof that a person did not undergo an objectively reasonable cooling off period before causing the death of the victim. *Shane*, 63 Ohio St.3d at fn.1, quoting 2 LaFave & Scott, *Substantive Criminal Law* (1986) 255, Section 7.10 (providing that voluntary manslaughter requires a defendant to show that “[a] reasonable man *** would not have cooled off in the interval of time between the provocation and the delivery of the fatal blow”). The incident Little cited as provocation took place in July 2006, one year before Little shot Turner to death. Even assuming Little proved adequate provocation, Little has not offered this Court any argument with regard to why one year would not be a sufficient cooling off period. See App.R. 16(A)(7). See, also, *Huertas*, 51 Ohio St.3d at 31-32 (concluding that instruction was not

warranted because evidence demonstrated a sufficient cooling off period). Thus, Little has not shown that the evidence warranted a voluntary manslaughter instruction. As such, the trial court did not abuse its discretion by refusing to instruct the jury on voluntary manslaughter. See *Shane*, 63 Ohio St.3d at 632.

{¶29} Little's captioned assignment of error also assigns error to the trial court as a result of the court's failure to instruct the jury on involuntary manslaughter. Yet, Little's argument fails to set forth or analyze any of the elements of involuntary manslaughter, as contained in R.C. 2903.04, in light of the evidence introduced at trial. See App.R. 16(A)(7). As this Court has repeatedly held, "[i]f an argument exists that can support this assignment of error, it is not this [C]ourt's duty to root it out." *Cardone v. Cardone* (May 6, 1998), 9th Dist. No. 18349, at *8. Thus, we will not engage in an analysis on Little's behalf with regard to the involuntary manslaughter instruction.

{¶30} Little's arguments that the trial court failed to instruct the jury on self-defense and voluntary and involuntary manslaughter lack merit. Little's first and second assignments of error are overruled.

III

{¶31} Little's assignments of error are overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

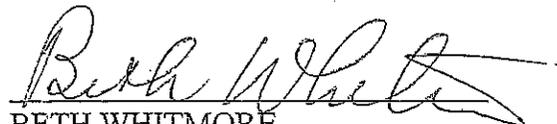
Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.


BETH WHITMORE
FOR THE COURT

CARR, P. J.
DICKINSON, J.
CONCUR

APPEARANCES:

PAUL GRIFFIN, Attorney at Law, for Appellant.

DENNIS P. WILL, Prosecuting Attorney, and MARY R. SLANCZKA, Assistant Prosecuting Attorney, for Appellee.

Stamp 120 & file on file

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs.

Terry L. Little,

Defendant-Appellant.

Case No. 07CR074162

On Appeal from the Lorain
County Court of Appeals
Ninth Appellate District

C.A. Case No. 10 CA 009758

NOTICE OF APPEAL OF APPELLANT Terry Little

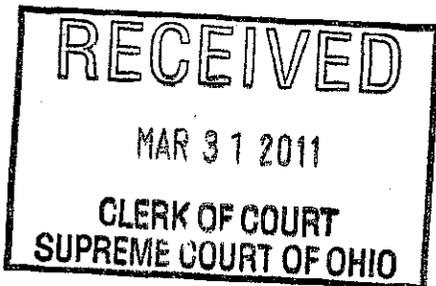
Terry Little 562207
NAME AND NUMBER
LECI
INSTITUTION
P.O. Box 58
ADDRESS
Luberon Ohio 45036
CITY, STATE & ZIP

PHONE

DEFENDANT-APPELLANT, PRO SE

MARY R. SLANCZKA
PROSECUTOR NAME
225 COURT Street 3rd FL.
ADDRESS
Elletts Ohio 44035
CITY, STATE & ZIP
(440) 325-5458
PHONE

COUNSEL FOR APPELLEE, STATE OF OHIO



MEMORANDUM IN SUPPORT

In order to pursue a claim of ineffective assistance of counsel in a direct appeal, Ohio law requires the claim to be raised within ninety days of state court of appeals entry of judgment. *State v. Murnahan* (1992), 63 Ohio St. 3d 60, 584 N.E. 2D 1204, Ohio R. App. P. 26 (B). The entry of judgment in the present case was made on December 23, 2009, therefore the instant application is being filed within the time limit proscribed by the rule and must be considered as timely.

This Court must decide if there is a genuine issue as to whether the appellant was denied the effective assistance of appellate counsel on his direct appeal as of right. *Evitts v. Lucey* (1985), 469 U.S. 387, 396. See also *Murnahan*, supra at 65. Appellate counsel is ineffective if appellate counsel's performance is objectively unreasonable, and if that deficiency substantially prejudice the defendant's appeal. *Strickland v. Washington* (1984), 466 U.S. 668, 687; *State v. Reed* (1996), 74 Ohio St. 3d 534, 600 N.E. 2D 456, 458 (holding that the *Strickland* analysis is the appropriate level of review to determine whether an appellant has raised a "genuine issue" in an application to reopen an appeal).

Appellant's Appellate counsel was ineffective because he failed to raise four (3) genuine issues infra, and there is no reasonable justification for this failure. Counsel's failure to insure that appellant's conviction would be reversed was prejudicial.

ASSIGNMENTS OF ERROR NOT PREVIOUSLY CONSIDERED

1. Trial court erred to the prejudice when the judge gave the jury erroneous jury instructions during deliberations. Trial courts abuse of discretion was more simply an error of law or an error in judgment it was arbitrary, unreasonable, and an unconscionable attitude on the part of the trial court, Trial court deprived Appellant of a fair trial in violation of the fourteenth Amendment to the United States constitution comparable provisions of the Ohio constitution during the course of trial in the sub judice, though a trial judge "is not prohibited from answering a jury's question of law during deliberation," but nevertheless the instruction is not required to be reduced to written instructions. The instructions created a manifest miscarriage of justice which was a constitutional error. During deliberation the jury asked the judge a question on a written piece of paper:

Jury: *"How do we decide the Aggravated Murder, and the Murder charges?"*

Then the judge answered by saying, while writing on a piece of paper in response to the jury's questions.

Judge Ewers: *"you have all the evidence, you decide."*

Trial counsel failed to object to improper instructions given to the jury in the process of deliberation. The jury clearly lost its way during deliberations creating a miscarriage of justice that prejudiced Appellant from having a fair trial. These statements made by the judge and jury are clear on transcript during the course of deliberations.

Test For erroneous Jury Instructions

These instructions, when viewed as plain error it shows the trial court was arbitrary, unreasonable, and had an unconscionable attitude. This unauthorized instruction allowed the jury to convict appellant of Aggravated Murder without finding that he had specific intent to kill, although vaguely worded, instruction did not authorize jury to presume specific intent or convict if it found that petitioner did not have intent to kill. This improper instruction prevented appellant from having a fair trial violating his rights under the sixth and fourteenth Amendment to the United States Constitution and Article I, 10 of the Constitution of the State of Ohio. A defective jury instruction does not rise to the level of plain error unless it can be shown that the outcome of the trial would clearly have been different but for the alleged error. *State v. Campbell* (1994), 69 Ohio St. 3d 38, 1994 Ohio 492, 630 N.E.2d 399; *Cleveland v. Buckley* (1990), 67 Ohio App. 3d 799, 588 N.E.2d 912. Moreover, a single challenged jury instruction may not be reviewed piecemeal or in isolation, but must be reviewed within the context of the entire charge. *State v. Hardy* (1971), 28 Ohio St.2d 89, 276 N.E.2d 247; *State v. Fields* (1984), 13 Ohio App.3d 433, 13 Ohio B. 521, 469 N.E.2d 939. To constitute plain error, the error must be on the record, palpable, and fundamental, so that it should have been apparent to the trial court without objection. *State v. Tichon* (1995), 102 Ohio App.3d 758, 767, 658 N.E.2d 16. Notice of plain error is to be taken with utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Phillips* (1995), 74 Ohio St.3d 72, 83, 1995 Ohio 171, 656 N.E.2d 643. ("The cumulative effect of errors in this trial denied the appellant his rights under the 14th Amendment. The cumulative effects of the above assigned errors warrant a new trial. Errors that are separately harmless may, when considered together, violate a person's constitutional right to a fair trial and should be reversed.")

For the reasons discussed herein, when considered the above referenced-instance of erroneous jury instructions were wholly improper and prejudicially affected Appellants right to a fair trial.

The trial court abused its discretion in the manner in which it responded to the jury's submitted question during deliberations.

The jury did not understand nor follow the prior instructions given to it by the court. (But instead followed the erroneous instructions the judge gave). That contention is wholly undone, not only by the note from the jury, but by voluminous and consistent Ohio supreme court case law unequivocally states: "A jury is presumed to follow the instructions given to it by the trial court." *State v. Loza* (1994), 71 Ohio St. 61, 1994 Ohio 409, 641 N.E.2d 1082; *State v. Ahmed*, 103 Ohio St. 3d 27, 2004 Ohio 4190, 813 N.E.2d 637; *State v. Twyford*, 94 Ohio St.3d 340, 2002 Ohio 894, 763 N.E.2d 122. A person can come up with many suggestions on what was going through the jury's mind when they couldn't come to a decision on how to decide on the aggravated murder, and the two allied offenses of murder. The jury didn't understand what allied offenses were, or maybe they figured the judge wanted the trial to just be over, so they just gave the verdict because they were misled by the court. If the judge would have re-read the instructions that was originally put forth to the court as in *State v. Lindsey* (2000), 87 Ohio St. 3d 479, 488, 2000 Ohio 465, 721 N.E.2d 995. or even if the jury were allowed to take instructions into the deliberation room they would of had a clear mind on how to come to a conclusion as to if the prosecutor proved every element of each crime. And for that defendant was prejudiced because the judge failed to follow the rules of the Ohio Constitution and United States Constitution.

A trial judge has discretion in responding to request for clarification from the jury, and the decision of the trial court is reviewed only for abuse of discretion. **State v. Carter** (1995), 72 Ohio St.3d 545, 1995 Ohio 104, 651 N.E.2d 965.

A judge may respond to a jury request for clarification by simply referring the jury to the written instructions, rather than giving additional oral instructions.

State v. Lindsey(2000), 87 Ohio St.3d 479, 488, 2000 Ohio 465, 721 N.E.2d 995.

In the case sub judice, the trial court, response to the jury, “you have all the evidence you decide” created such a manifest miscarriage of justice the outcome of the trial was flawed making the manifest weight of the evidence insufficient to legally support a conviction. The trial courts statement was unreasonable: because it denied defendant of a fair trial, and benefited prosecution by relieving her of the duty to prove beyond a reasonable doubt and show how the conviction of aggravated murder is justification. Arbitrary: because the judge responded to the jury's question with out directing the jury back to the written instructions which was procedure and by law the process to follow. Unconscionable: the judge had no regard to the justice of the Appellant. The improper clarification the judge gave to jury during deliberation was careless and unreasonable. The judge wrote his own note to the jury in response to there question which also is a miscarriage of justice, a judge should not reduce instructions to a response during deliberations to writing.

2.Trial erred when it abused its discretion by denying defendant appellants motion for a new trial:

section O.R.C.2945.79 stats that a new trial, after a verdict of conviction, may be granted where defendants substantial rights have been materially affected **State v. Porter** 14 Ohio St.2d 10, 235 N.E. 2D 520 Ohio 1968.

The issue is being raised because trial courts erroneous instruction given to the jury violated defendants 14th amendment right to a fair trial. This error was on the record and was so apparent the trial didn't need an objection to such an error of law. The motion was filed Dec. 18 2009 Pro se. this motion is attached to this reopening application for evidence of filing.

3. Appellant was denied the Effective Assistance of Trial counsel as guaranteed by the Fifth, Sixth, Eighth, And fourteenth Amendments to the United States Constitution when trial counsel failed to object to the improper instructions given to the jury during deliberations.

Appellant received ineffective assistance of trial counsel in violating his rights under the sixth and fourteenth Amendment to the united States Constitution and Article I, 10 of the Constitution of the State of Ohio.

To obtain reversal of a conviction, a defendant must prove: (1) that counsels performance fell below an objective standard of reasonableness and (2) that counsels deficient performance prejudiced the defendant, resulting in a unreliable or fundamentally unfair outcome in the proceeding.

In any case in determining whether an erroneous jury instruction was prejudiced, the reviewing court is to review the jury instructions in their entirety. State v. Getsy (1998), 84 Ohio St. 3d 180, 196, 702 N.E. 20 866.

Counsels performance fell below an objective standard when he failed to object to an erroneous instruction given to the jury by the trial judge. In Attorneys profession there trained to object, and what to object to. Trial counsel failed to object to such an error in trial. And his performance for not objecting to this error it created an unjustified conviction of Aggravated Murder and two allied offenses of Murder.

Appellant would simply like to incorporate the arguments made in the preceding issue, and because of the above issue, Appellant's counsel did not render effective assistance when he failed to object to the judges improper instructions that was given to the jury during deliberations. The failure of counsel to have not objected to this line of improper assertions rises to the level of ineffective assistance of trial counsel, necessitating reversal of Appellant's conviction. Strickland v. Washington(1984), 466 U.S. 668; State v. Bradley(1989), 42 Ohio St.3d 136; Hodge v. Hurley, 426 F.3d 368, 377 (6th cir. 2005).

Appellant clearly didn't see Eye to eye defendant filed a motion to dismiss counsel on 6-19-09 the trial court denied that motion. Denying him of his right to trial counsel. The document is attached to this document.

CONCLUSION

Foe the reasons stated above, Appellant is entitled to have his direct appeal opened to raise the federal and states constitutional errors that appellate counsel failed to raise

Respectfully submitted

Terry L. Little #562207
Appellant, PRO SE