

IN THE SUPREME COURT OF OHIO

Case No.

**11-2080**

State of Ohio,

Appellee,

v.

Matthew Warmus,

Appellant.

On Appeal from the Cuyahoga  
County Court of Appeals,  
Eighth Appellate District

Court of Appeals  
Case No. CA 96026

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APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

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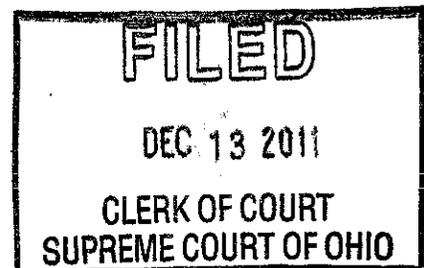


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A witness may not provide testimony in an area which will not assist the jury to understand the issues at hand. Because a juror does not need assistance in listening, an audio expert may testify as to the technique used to enhance a tape, but may not testify as to the content of that tape. ....

Proposition of Law III:

Repeated instances of the prosecution misstating evidence, misrepresenting the law, accusing a defendant of uncharged offenses, and generally encouraging the jury to base its verdict on emotion rather than the evidence individually and cumulatively act to deprive a defendant his right to a fair trial. ....

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Ohio's requirement that a defendant bears the burden of proof when raising the defense of self-defense is barred by both the federal and Ohio constitution. ....

Proposition of Law V:

The trial court has an affirmative duty to conduct a hearing into the possible prejudice which may have resulted from any improper contact between the court and a juror. Because the state bears the burden of proving no prejudice resulted from the contact, the failure to conduct a hearing must result in a new trial. ....

Proposition of Law VI:

A trial court may not restrict defense cross-examination of state witnesses to attack improper opinion testimony on the state of the law of self-defense. ....

Proposition of Law VII:

Where a defendant asserts self-defense, an instruction requiring both the state and the defense to prove the elements of self-defense is confusing and ambiguous. Where the totality of the instructions fail to clearly convey the state of the law, a reversal of the conviction is required. ....

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The failure to object to a meritorious issue or issues constitutes ineffective assistance of counsel where the failure to do so resulted in the jury hearing unfairly prejudicial evidence which rendered the verdict unreliable. ....

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

There are a litany of issues that this Court needs to correct that stem from Warmus' case below. This includes an expansion of the invited-error doctrine into an area never before countenanced by this Court or any other court for that matter. In addition, the appellate court invoked an improper harmless error standard, refusing to apply Chapman v. California (1967), 386 U.S. 18 standard, which is that the state must prove beyond a reasonable doubt that the error did not contribute to the conviction. *See also* State v. Bayless, (1976) 48 Ohio St. 2d 73, 106. Here, in five separate claims, the Eighth District found acknowledged error including; an expert witness improperly claiming to hear an admission made by Warmus on a tape recording that no one, including the court of appeals, could hear; repeated instances of improper opinion testimony by lay and expert witnesses concerning self-defense which urged an objective rather than subjective standard for Warmus' actions; repeated prosecutorial misconduct and incorrect jury instructions.

In regard to the improper lay and expert testimony on the standards for self-defense, the appellate court attempted to distinguish present case from State v. Johnson, 2002 Ohio 6957 (Franklin Co. 12-17-02) (where the Tenth District found structural error for a lesser violation) by noting that the officers here were offering opinions as to what *they as officers* would have done, not what Warmus should have done. The court below even understatedly acknowledged this was "a fine distinction to make." Even if it were accepted as a valid distinction, it then becomes more unclear how the evidence then had relevance to this case and was not improperly misleading to the jury. Instead, the court below, again stretching the principle beyond all previous limits, simply indicated

that the defense invited the testimony by a comment made in opening statement which states that even a police officer would have acted similarly as the defendant.

Additionally, the appellate court found that the trial judge's act of providing a ride to a juror to court in the morning during the trial, not revealing this fact until the defense began its case and failing to conduct a hearing on the matter, was also harmless error.

### Contradiction of Right to Bear Arms and Affirmative Duty to Prove Self-Defense

Also of great significance, this case presents an extremely current topic which is being pushed to the legal forefront; the right to bear arms under the Second Amendment and Ohio's own constitutional protection of that right and the relation of that right on the right to self-defense. Currently, it appears that Ohio stands alone in forcing a defendant who is properly carrying a firearm to prove to have the burden of proof of the right to use it in self-defense. In every other state, including the federal law, the prosecution must prove beyond a reasonable doubt that the defendant did not act in self-defense. The recent United States Supreme Court in District Court of Columbia v. Heller (2008), 554 U.S. 570 and Apprendi v. New Jersey (2000), 530 U.S. 466 call in the question whether Martin v. Ohio (1987), 480 U.S. 228 remains viable.

Furthermore, this Court may revisit whether Ohio's independent constitutional provision granting that right to bear arms to its citizenry for their *defense and security* is contrary to the requirement that the citizen prove that he/she used the arm for defense and security. This burden of proof requirement is particularly out of step with the Ohio legislature's actions of passing right-to-carry laws. One has a constitutional and statutory right to carry a gun for protection, but if it is used for that purpose, the onus is on the person who was provided the right rather than the government.

## **STATEMENT OF THE CASE AND FACTS**

On April 19, 2010, a Cuyahoga County grand jury indicted the defendant-appellant Matthew Warmus for one count of Murder in violation of R.C. §2903.02. The charge included a three-year firearm specification pursuant to R.C. §2941.145. Warmus pleaded not guilty to the count at his arraignment on April 22, 2010.

A jury trial began on October 18, 2010. On October 28, 2010, the jury found Warmus guilty of the charged offense and firearm specification.

That same day, the trial court sentenced Warmus to the statutorily mandated sentence of life with parole eligibility after fifteen years. This sentence is being served consecutively to a three year firearm specification.

On November 10, 2011, the Eighth District Court of Appeals affirmed the convictions with the exception of a sentencing error which included the imposition of an improper fine.

### **Factual Summary**

There was no dispute that Matthew Warmus, a 25 year old college student with no prior criminal record, shot and killed the decedent, David Williams after a brief argument in a commercial parking lot across from Quicken Loans Arena in Cleveland, Ohio, prior to a basketball game. Warmus testified that he had fired in self-defense after having seen Williams pull a gun. The prosecution argued that Warmus should have vacated the area before the argument had escalated to that point.

The state presented a number of witnesses who each observed different portions of the events from differing vantage points. Over defense objection, almost all witnesses, including police officers, were permitted to opine that based upon their observations and understanding of

self-defense, they felt that the shooting by Warmus was not justified. These are more fully set forth in Proposition of Law I.

However, none of the state witnesses had seen Williams draw his gun. State's trace evidence expert Curtis Jones verified Warmus' claim that Williams had drawn the gun at the time of the shooting due to the presence of blood spatter found on Williams' gun. He indicated that there was "no question" that Williams weapon was out when he was shot.

The facts will be further discussed in the following Propositions of Law.

## ARGUMENT

### **Proposition of Law I:**

**Where a defendant asserts a self-defense, a witness may not provide his or her opinion on whether the defendant should have retreated without action as self-defense encompasses a subjective evaluation of the defendant's acts rather than objective standard.**

The trial court improperly permitted opinion testimony in the state's case-in-chief by police "experts" and lay witnesses regarding key elements of self-defense, including duty to retreat and reasonableness of the use of deadly force. Over objections of the defense, the trial court allowed the prosecution's witnesses to offer opinions on whether Warmus was reasonable in his use of deadly force. The trial court also improperly permitted both police and lay witnesses to provide their opinion regarding whether Warmus could, or should have been able to safely retreat without using force. This was permitted untethered to the law applicable to either key issue. Each witness offered their unfettered opinion on the ultimate issue in the case without limitation. As such it was unclear if their opinion was legal, moral or based upon some other

unidentified calculus.

Timothy Zvoncheck was pulling into the parking lot when he noticed the altercation between Warmus and Williams. While he had only a restricted view, particularly as to whether the deceased was holding a weapon, Zvoncheck was permitted to twice opine (over defense objection) that Warmus could have retreated and that it was his belief that Warmus' life was not in danger.

Stuart Shoaff, a retired FBI agent was also pulling into the parking lot and observed portions of the altercation. He was permitted to offer his opinion as a former armed law enforcement officer. It was his opinion that Warmus was not justified in shooting Williams. This, again was the opinion of a man who was not able to see that the decedent was armed with a firearm.

Eric Livingstone had already parked his car in the lot when the altercation began. Again, even though the decedent's back was to him he was able to opine over objection that Warmus was not "in any danger" and that he could have just left the lot. However, he admitted that he did not know that the decedent was armed and also could not hear what was being said between the two men.

Demetrius Jackson, another parking lot patron also was not aware that the decedent was armed but was permitted to offer his opinion that Warmus did not have reason to be in fear of his life.

Rebecca Beall was permitted to offer her opinion as to Warmus' guilt and explain she contacted police late in the investigation " *because he (Williams) was wrongly shot*" and that the shooting did not have to happen. The appellate court found that all the foregoing were proper lay

opinion testimony pursuant to Evid. R. 701. The court of appeals opinion, if permitted to stand, will expand the scope of that rule beyond all previous boundaries.

Perhaps most damaging was the testimony of Cleveland Police Officers. Officer Andrew Gasiewski was permitted to emphatically state that as an experienced police officer, if he was in Warmus' position, he would not have shot and killed Williams. Detective Lem Griffin, the homicide detective in charge of the case (who sat at the prosecutor's table throughout the trial), was permitted to offer a number of opinions which encompassed both his and others belief as to Warmus' state of mind; his understanding of the applicable law; and even the propriety of the defense in general. Without objection he opined that based upon his understanding of 'deadly force' he would not be permitted to use deadly force in response to a headlock.

The detective was also permitted over objection to characterize the shot sustained behind Williams' ear as a "hit man shot" or a "kill shot", thereby implying, not so subtly, that Mr. Warmus "executed" Williams, a remark which would become a central theme employed by the state in questioning of defense witnesses as well as repeated references in closing argument.

In State v. Coulter (1992), 75 Ohio App. 3d 219, the court held that "[w]hen an issue of fact is within the experience, knowledge and comprehension of the trier of fact, expert opinion testimony on that issue is unnecessary and inadmissible since it would not assist the trier of fact in understanding the evidence or a fact in issue." The court went on to note that "[e]xcept for a narrow exception in cases involving the battered woman syndrome, the law as it existed prior to Koss has not changed. Expert testimony regarding the defendant's state of mind remains inadmissible." Id., at 229.

In a case remarkably similar to the present case, the Tenth District (Franklin County) found that similar testimony warranted reversal even in that case under a *plain error* standard. In State v. Johnson, 2002 Ohio 6957 (Franklin Co. 12-17-02) the Tenth Appellate District reversed a felonious assault conviction where, police officers were permitted to offer expert testimony (as here) regarding justification for using deadly force. The Johnson court found that generally self-defense was *not* a proper subject for expert testimony and likely mislead the jury, and even if it were relevant, its value was substantially outweighed by the danger of unfair prejudice.

The court below attempted to distinguish the present case by noting that the officers here were only offering opinion as to what *they as officers* would have done, not what Warmus would have done. The court below even understatedly acknowledged this was “a fine distinction to make.” Even if this “fine distinction” were accepted, it then becomes more unclear how the evidence then had relevance to this case and was not improperly misleading to the jury. Instead, the court below, again stretching the principle beyond all previous limits, simply indicated that the defense invited the testimony by a comment made in opening statement in his hyperbole that even a police officer would have acted in self-defense..

**Proposition of Law II:**

**A witness may not provide testimony in an area which will not assist the jury to understand the issues at hand. Because a juror does not need assistance in listening, an audio expert may testify as to the technique used to enhance a tape, but may not testify as to the content of that tape.**

An expert in audio and video technology testified on behalf of the state. During his testimony, the witness went beyond his expertise and became a listening or hearing expert. Defense counsel objected to the witness’s claim that he could “hear” the content of a tape

because of his training and testified as to the words he heard the defendant speak. The defense vehemently disagreed with the conclusion and argued the content of the recording was a jury decision rather than a witness testifying to his belief of the content. This was particularly true where the expert testified he was an expert in an area that was not accepted as a scientific or technological endeavor in violation of Daubert v. Merrell Dow Pharmaceuticals (1993), 509 U.S. 579.

The Eighth District Court of Appeals agreed that the testimony was improper, but found the error to be harmless. The witness testified outside of his expertise. He was not a listening “expert.” Nevertheless, he testified that he heard on a recording an alleged damaging admission by Warmus that no one, including the Court of Appeals panel, could hear. The panel’s finding that this extremely prejudicial testimony constituted harmless error can only mean that the panel did not implement the “contribute to the conviction” standard that constitutionally mandated. The error violated Warmus’ right to due process under the Fifth and Fourteenth Amendments to the United States Constitution.

**Proposition of Law III:**

**Repeated instances of the prosecution misstating evidence, misrepresenting the law, accusing a defendant of uncharged offenses, and generally encouraging the jury to base its verdict on emotion rather than the evidence individually and cumulatively act to deprive a defendant his right to a fair trial**

The state is under an obligation to prosecute impartially. The United States Supreme Court emphasized the special responsibility and status of the government's attorney in Berger v. United States (1935), 295 U.S. 78. The following acts of misconduct occurred during Warmus’

trial.

1. Improper elicitation of expert and non-expert opinion evidence as set forth in Assignment of Error I. (incorporated here by reference)
2. Improper questioning of defense psychiatric expert to create inference that Warmus may suffer from personality or psychiatric disorders.
3. In questioning a character witness, the prosecutor purposely misstated evidence to make it appear that the sequence of shots fired was different than evidence presented which would later be used to support the state's improper "execution" arguments. The prosecutor also asked inflammatory questions of witnesses regarding path of bullet in the decedent's head which were completely irrelevant to character testimony offered.
4. In questioning Warmus on cross-examination the state asked: "Where did you learn that type of military style execution? This question had absolutely no basis in fact and could have only been asked to incite the passion of the jury.
5. During questioning of Warmus, the state suggested that he had a burden to bring in witnesses to corroborate his testimony. Also insinuated in front of the jury was that he "fought" the state in a pre-trial discovery matter which had nothing to do with the case. This was a clear attempt to have the jury consider extraneous matter that was not properly before them.
6. In closing argument the prosecutor again referred to the shot that hit Williams behind the ear as an "execution".
7. Introducing improper alleged 'other acts' evidence by creating impression in front of the jury that Warmus illegally transported a firearm in his vehicle. Warmus was not charged with such an offense. It is questionable whether the prosecutor was even correct in his assessment of the law. The appellate court noted that there was not even a basis for the suggestion of such.

The error violated Warmus' right to due process under the Fifth and Fourteenth Amendments to the United States Constitution.

**Proposition of Law IV:**

**Ohio's requirement that a defendant bears the burden of proof when raising the defense of self-defense is barred by both the federal and Ohio constitution.**

Ohio's law in relation to self-defense remains anachronistic. Ohio is the last state in the United States that still applies an affirmative burden of proof on defendants asserting justifiable homicide on a theory of self-defense. The other 49 states and the federal court system require the prosecution to prove that the defendant's actions were not in self-defense beyond a reasonable doubt. In view of the above, and recent United States Supreme Court decisions, it is clear that the present statutory requirement of placing the burden of proof on the defendant constitutes a burden shifting that violates the Sixth Amendment's jury trial guarantees, and Article I, Sec. 4 of the Ohio Constitution (people have right to bear arms for their defense and security)

The issue takes on a new dimension in light of the Supreme Court of the United States decision in District Court of Columbia v. Heller (2008), 554 U.S. 570, 128 S.Ct. 2783. In Heller, the Court anchored self-defense in the Second Amendment. Thus, any statute placing the burden proving self-defense would run contrary to the Second Amendment, which provides a presumptive right to self-defense as one of the underpinnings of that Amendment. The Court clearly viewed the Second Amendment as conveying an inherent constitutional right to defend one's person, home and property.

The recognition in Heller of an inherent constitutional right to self-defense is not in direct conflict with Martin v. Ohio (1987), 480 U.S. 228 (holding 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) as the Second Amendment issue was not before the Court at that time. This Court is therefore not bound by Martin in this regard.

In Apprendi v. New Jersey (2000), 530 U.S. 466, the Court held that 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.” *Id.*, at 483. Consequently, *Apprendi* determined that sentencing factors that a judge may find in order to impose a harsher sentence constituted elements of the offense and thus must be proven to a jury beyond a reasonable doubt. *Id.* Thus, the lack of self-defense is now an element, as defined by the United States Supreme Court. As such, the burden is upon that state to prove the lack of self-defense. Therefore, Ohio’s statute runs afoul of the Second Amendment.

**Proposition of Law V:**

**The trial court has an affirmative duty to conduct a hearing into the possible prejudice which may have resulted from any improper contact between the court and a juror. Because the state bears the burden of proving no prejudice resulted from the contact, the failure to conduct a hearing must result in a new trial.**

During the trial, the trial judge announced to the parties that he had provided a ride to Juror No. 10. The juror needed a ride to court and did not have bus fare. The juror had contacted the judge’s chambers. The judge’s bailiff had contacted the judge, who was on his way to court. The judge provided the juror a ride to court. Although the court tardily informed the parties of the ride (only after taking the testimony of two defense witnesses), the court failed to hold the required hearing pursuant to *Remmer v. United States* (1954), 347 U.S. 227, 229-230. Without the hearing, it is impossible to establish whether prejudice occurred. Because the burden to prove lack of prejudice is on the state, the failure to hold a hearing requires a new trial. The failure deprived Warmus his right to due process under the Fifth and Fourteenth Amendments to the Federal Constitution.

The Eighth District Court of Appeals erroneously found harmless error because the juror in question was an alternate. This finding is incorrect, although originally an alternate, the juror

sat as a member of the final twelve as an original juror was dismissed. Thus, the tainted juror did participate in the deliberation and signed the verdict forms.

**Proposition of Law VI:**

**A trial court may not restrict defense cross-examination of state witnesses to attack improper opinion testimony on the state of the law of self-defense**

The trial court would not allow the defense to completely cross-examine Eric Livingstone about the accuracy of what he had seen. Livingstone, a lay witness, testified that in his opinion, Warmus was never in any danger. Not only was Livingstone's opinion as to Warmus' subjective feeling of danger improper, the court refused to allow the defense to mitigate the error.

To contradict this testimony, the defense sought to ask Livingstone if he might question his conclusion if he had been aware that the decedent not only possessed a gun, had it on his person and pulled it prior to being shot. The trial court refused to allow this questioning. This denial was based upon the court's finding that the EMS tech and the trace evidence testimony had found that the gun had not been pulled. The judge ignored the testimony during a suppression hearing that the gun had been found laying in proximity to the victim when he arrived. The judge was just flat incorrect on the trace evidence testimony, which had found that because of blood splatter had been located on the gun, the gun was necessarily out of any holster or pocket.

The court improperly allowed the prosecutor to elicit self-defense law from Lem Griffin, a homicide detective with the Cleveland Police Department. Griffin, over objection, answered the question of "when as a police officer" could he use deadly force. He noted the need to be "100 percent sure. Not 100 percent sure, but sure enough that you feel there's an imminent threat

on your life.” He also testified about the duty to retreat. He failed to mention the subjective nature of self-defense.

When defense counsel attempted to question the officer about his understanding of the law, the judge sustained state objections. Defense counsel wanted to have the officer acknowledge that he was not an attorney. The court sustained a prosecutor objection that the witness had not expressed any legal opinion, which, under the circumstances, was incorrect. The court’s restrictions deprived Warmus of his Fifth Amendment right to confrontation. Coy v. Iowa (1988), 487 U.S. 1012, 1020 (noting that the Confrontation Clause implies the right to cross-examine witnesses). *See also*, Delaware v. Van Arsdell (1986), 475 U.S. 673, 679.

**Proposition of Law VII:**

**Where a defendant asserts self-defense, an instruction requiring both the state and the defense to prove the elements of self-defense is confusing and ambiguous. Where the totality of the instructions fail to clearly convey the state of the law, a reversal of the conviction is required.**

In the present case, the trial court provided the jury with the following instruction at the conclusion of the evidence.

*If you find that the State proved beyond a reasonable doubt all of the essential elements of the offense of self-defense against the danger of death or great bodily harm, and if you further find that the defendant failed to prove by a preponderance of the evidence the defense of self-defense, then your verdict must be guilty, so on the other hand, if you find the State failed to prove beyond a reasonable doubt any one of the essential elements of the offense of self-defense against danger of death or great bodily harm, or if you find that the defendant proved by a preponderance of the evidence the defense of self-defense, then you must find the defendant not guilty. (Emphasis added)*

The above instruction is convoluted, confusing and inaccurate. In determining the question of prejudicial error in instructions to the jury, the charge must be taken as a whole, and

the portion that is claimed to be erroneous or incomplete must be considered in its relation to, and as it affects and is affected by the other parts of the charge. If from the entire charge it appears that a correct statement of the law was given in such a manner that the jury could not have been misled, no prejudicial error results. State v. Hardy (1971), 28 Ohio St.2d 89, 92. Warmus' right to due process under the Fifth and Fourteenth Amendments to the Federal Constitution was violated by the improper instruction.

**Proposition of Law VIII:**

**The failure to object to a meritorious issue or issues constitutes ineffective assistance of counsel where the failure to do so resulted in the jury hearing unfairly prejudicial evidence which rendered the verdict unreliable.**

The Eighth District found that the opening statement of defense counsel, stating that even a police officer would have acted in self-defense, invited the error addressed in the First Proposition of Law. If so, clearly Warmus was deprived of his right to effective assistance of counsel as the prosecutor was permitted, through witnesses, to change the standard for self-defense from subjective to objective. Counsel also failed to object to the confusing summary instruction to the jury as addressed in the Seventh Proposition of Law. Strickland v. Washington (1984), 466 U.S. 68.

**Proposition of Law IX:**

**A combination of errors may result in the requirement of a new trial even where the errors standing alone may not require reversal of the conviction.**

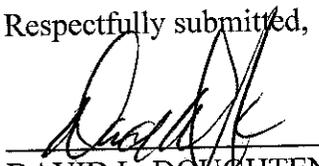
The combination of errors by the trial court, the prosecution and the ineffectiveness of the defense counsel deprived Warmus of a fair trial. The errors outlined above, if not individually, combined to cause the trial to be constitutionally infirm. State v. DeMarco (1987), 31 Ohio St.3d

191. These errors, as addressed in the preceding Assignments of Error in this brief, combined to violate Warmus' due process right to a fair trial and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

**CONCLUSION**

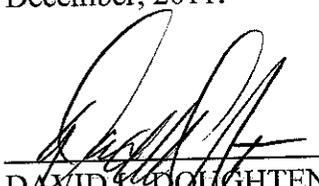
Pursuant to the preceding Propositions of Law, the defendant-appellant, Matthew Warmus, respectfully requests that this Honorable Court accept jurisdiction of this case and decide the issue on its merits.

  
ROBERT A. DIXON  
Counsel for Appellant

Respectfully submitted,  
  
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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, Justice Center-9th Floor, 1200 Ontario Street, Cleveland, Ohio, 44113 on this 12 day of December, 2011.

  
DAVID L. DOUGHTEN  
Counsel for Appellant

## APPENDIX

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 96026

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**MATTHEW WARMUS**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED IN PART, REVERSED  
IN PART, AND REMANDED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-536383

**BEFORE:** Stewart, P.J., Cooney, J., and S. Gallagher, J.

**RELEASED AND JOURNALIZED:** November 10, 2011

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

NOV 10 2011

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

MELODY J. STEWART, P.J.:

A jury found defendant-appellant Matthew Warmus guilty of murdering a parking lot attendant in a dispute over a parking fee, rejecting his claim that he acted in self-defense. In this appeal, he sets forth 11 assignments of error that collectively raise issues concerning the court's admission of testimony, the jury instructions, ineffective assistance of counsel, and the imposition of a fine.

The relevant facts of this case are stated in summary form. The state showed that Warmus and his female companion for the evening entered a downtown Cleveland parking lot that advertised \$10 parking. Warmus parked in a space next to the lot entrance, but the victim-attendant, David Williams, told him that he had parked in a \$20 parking space. Believing he was being cheated, Warmus began to argue with Williams. The argument escalated and Warmus pushed Williams. Williams pushed back, and the two men grappled until Williams put Warmus in a headlock and punched him three times. During this struggle, the attendant told Warmus's companion to "calm your boy down." The companion told Williams that they would leave, so he released Warmus and went to assist other drivers who had entered the lot. Warmus went to the trunk of his car and retrieved a handgun. He pointed the gun at Williams and told him to get on the ground. Williams began reaching for his own gun when Warmus fired three shots from a range of no more than three feet: one shot

struck Williams in the back of the head; the other two struck him in the abdomen.

Warmus claimed to have acted in self-defense. He said that Williams's headlock caused him to lose his breath. Once released from the hold, he said that he struggled to regain his breath and heard Williams tell him to leave. Warmus replied that he was going to call the police and the owner of the parking lot to complain. At that point, Williams said "no you're not" and pulled out a gun. Warmus said he walked to his car, opened the trunk, and grabbed his gun. Warmus pointed the gun at Williams and told him to drop his gun, but Williams refused. Warmus then "shot until [Williams's] gun wasn't in his hand anymore." He placed his gun back in the trunk of the car and called the police to report the shooting.

Eyewitnesses disputed Warmus's version of events. Although all of the eyewitnesses saw Warmus shoot Williams, none of them saw Williams holding a gun, much less pointing one at Warmus (one witness saw Williams reaching for his gun as Warmus shot him). When the police arrived, Warmus said that he knew Williams from a similar interaction a month earlier when he tried to park in the same spot and was charged an additional fee, saying that "I know him. We argued over this in the past." As Warmus sat in a police cruiser following his arrest, he told an officer that after Williams released him from the

headlock, he went back to selling parking spaces. And at no point in speaking with the officer, or at any other point in the investigation, did Warmus say that he acted in self-defense. The police also found it unusual that a number of witnesses approached them after-the-fact to report the shooting. One of them appeared to embody the views of these witnesses by saying that she did so because she "felt that if nobody was witness for [Williams], because he was wrongly shot, I thought I should stand up for him."

I

Warmus's first assignment of error is that the court abused its discretion by allowing state witnesses to offer their opinion on key elements of self-defense — primarily their opinions that Warmus was not acting reasonably in his use of force and that he could have or should have safely retreated without using force. He complains that these opinions amounted to opinion testimony on whether he was justified in using deadly force to defend himself. He argues that justification for deadly force was a question of fact for the jury and that the so-called expert testimony usurped this function.

A

The elements of self-defense are: “(1) the defendant was not at fault in creating the violent situation, (2) the defendant had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape was the use of force, and (3) that the defendant did not violate any duty to retreat or avoid the danger.” *State v. Thomas*, 77 Ohio St.3d 323, 326, 1997-Ohio-269, 673 N.E.2d 1339, citing *State v. Williford* (1990), 49 Ohio St.3d 247, 249, 551 N.E.2d 1279.

Ohio uses a subjective test to determine whether the defendant held a bona fide belief of imminent danger, death, or great bodily harm. The defendant acts in self-defense if he “honestly believes” that death or great bodily harm is imminent and that the only means of escape from such danger is in the use of deadly force. *State v. Sallie*, 81 Ohio St.3d 673, 676, 1998-Ohio-343, 693 N.E.2d 267, citing *State v. Koss* (1990), 49 Ohio St.3d 213, 215, 551 N.E.2d 970.

Though the defendant bears the burden of proving self-defense by a preponderance of the evidence, *State v. Jackson* (1986), 22 Ohio St.3d 281, 283, 490 N.E.2d 893, this does not mean that the state is barred from offering evidence to rebut the assertion of the affirmative defense in its case-in-chief. The state may offer testimony on the circumstances surrounding the events leading to the use of self-defense as a means of rebutting the defendant's

assertion that he honestly believed the use of deadly force was in response to an imminent threat of death or great bodily harm. The question in this appeal is whether the state's witnesses may offer their *opinion* that the circumstances did not justify the defendant's use of deadly force.

Although some of the witnesses were current or retired law enforcement officers, none were offered as expert witnesses. An "expert" witness is allowed to testify to matters beyond the knowledge or experience possessed by lay persons if the witness has specialized knowledge or skill and the witness's testimony is based on reliable scientific, technical, or other specialized information. See Evid.R. 702. The law enforcement officers were offered as fact witnesses because they actually witnessed the shooting. And the conclusions they drew about Warmus's state of mind at the time were not based on any specialized knowledge or training but were, like those of the civilian witnesses who gave similar testimony, premised on their perception of events as they witnessed them.

A witness who is not an "expert" may testify to opinions, but is "limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." See Evid.R. 701. We have interpreted Evid.R. 701 to allow a lay witness to express opinions that "merely summarize

complex factual observations, which testimony is a composite of fact and opinion.” *State v. Morris* (1982), 8 Ohio App.3d 12, 16, 455 N.E.2d 1352.

Importantly, a lay witness cannot testify only to a “fact in issue” but can also testify to “an ultimate issue.” Evid.R. 704 states that the testimony of a witness “in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” Neither Evid.R. 701 nor 704 limits the subject matter of lay opinion testimony, so “there is no theoretical prohibition against allowing lay witnesses to give their opinions as to the mental states of others.” *United States v. Rea* (C.A.2, 1992), 958 F.2d 1206, 1214-1215 (construing analogous federal rules). For example, it has been stated that “[l]ay opinion of a witness as to a person’s sanity is admissible if the witness is sufficiently acquainted with the person involved and has observed his conduct” and has personal knowledge “regarding the person’s unusual, abnormal or bizarre conduct.” *United States v. LeRoy* (C.A.10, 1991), 944 F.2d 787, 789. See, also, *State v. Nicholas* (July 30, 1986), 1st Dist. No. C-850713 (where an insanity defense was raised, lay opinion of a police officer concerning the defendant’s mental state was appropriate on ability to perceive and respond to the display of authority of uniformed officers at the scene).

Opinions as to whether a defendant had the required state of mind when acting in self-defense is not the same thing as allowing a lay witness to express an opinion as to what the witness would have done in similar circumstances. In *State v. Johnson*, 10th Dist. No. 02AP-373, 2002-Ohio-6957, the court held that it was improper for police officers who did not witness the crime to state that, based on their training as law enforcement officers and faced with the same facts and circumstances as presented in the case, they would not have shot another in an act of self-defense as claimed by the defendant. These statements were inadmissible as lay opinion because they were not helpful to the jury — neither police officer in *Johnson* actually witnessed the crime, so their conclusions based on the same facts as heard by the jury failed to meet the Evid.R. 701 test of aiding the trier of fact in deciding an ultimate issue. *Id.* at ¶36. *Johnson* held that the jury was just as capable of drawing conclusions from the evidence, as were the police officers who did not actually witness the crime.

B

Timothy Zvoncheck saw the altercation between Warmus and Williams as he pulled into the parking lot. He testified that 30 seconds elapsed from the time that Williams released Warmus from the headlock to when Warmus went to the trunk of his car to get the gun. When asked if “there was anything

preventing the defendant from simply leaving the parking lot," Zvoncheck replied, "no." The state went on to ask, "[a]fter [the victim] released the defendant from the headlock, did you believe that the defendant's life was in danger?" Over objection, Zvoncheck replied, "no." Zvoncheck later reaffirmed that "I believe [Warmus] could have left the parking lot."

Eric Livingstone parked his car in the parking lot and was walking to the arena when he saw the shooting. When asked by the state whether "there was anything preventing [Warmus] from simply leaving the parking lot," Livingstone answered, "no." The state then asked, "from your vantage point as you were watching this happen, the initial fight when the defendant goes to his trunk, did you think in your opinion the defendant was in any danger?" Livingstone again replied "no."

Demetrius Jagers was in the passenger seat of a car that was being held up in traffic near the parking lot. He saw Warmus and Williams wrestling until Williams put Warmus in a headlock. Williams released Warmus and started to walk to the parking attendant's booth. Jagers saw Warmus reach into his trunk and pull out the gun. As Jagers turned to tell his wife about the gun, he heard three shots and saw Williams on the ground. Jagers said that Williams did not attempt to prevent Warmus from walking away after releasing him from

the headlock. The state then asked, “[f]rom your observations, did you believe that the defendant had a reason to fear for his life?” Jagers answered, “no.”

Rebecca Beall testified that she pulled into the lot and saw two men wrestling, with one holding the other in a headlock. She saw Warmus’s companion grab Williams’s arm and tell him that she and Warmus would leave. Williams walked to the front of Beall’s car while Warmus went to the trunk of his car and pulled out a gun. Beall’s 12-year-old son asked, “is that guy going to shoot him?” She covered her son for protection because he was on the same side of the car as Warmus and then saw Warmus shoot Williams. She saw Williams make no aggressive movements toward Warmus after releasing him from the headlock. The state asked her, “from your vantage point in this car where you are, did this incident with Mr. Warmus going to the trunk and reapproaching and shooting [Williams], and from your vantage point, did this have to happen?” She replied, “no.”

Stuart Shoaff, a retired agent for the Federal Bureau of Investigation, was in his car waiting in traffic near the parking lot when he saw two individuals wrestling. He recounted that Williams had Warmus in a headlock and punched Warmus with “three little quick punches” that he said “didn’t look very hard to me.” The two men broke apart, and he saw Warmus walk to his car and get something from his trunk, although he could not see what it was.

Warmus walked back toward Williams, and Shoaff heard three quick pops that he knew were gunshots. Shoaff said that Williams made no aggressive moves toward Warmus after Warmus started for the trunk of his car. The state then asked, "did you believe that [Warmus] was in imminent fear of his life?" Shoaff replied, "[n]o."

Cleveland police detective Lem Griffin investigated the murder. In describing the guidelines that the police had to follow before they could use deadly force, Griffin explained that it was a "continuum" in which the force used had to be proportionate to the threat. The state then asked, "[b]ased on your understanding of deadly force, would you be permitted to use deadly force in response to a real strong headlock?" Griffin replied, "[n]o." He further explained that before a police officer could fire a gun in response to danger, the officer had to be "not 100 percent sure, but sure enough that you feel there's an imminent threat on your life." Finally, in response to the question, "[i]f someone is putting you in danger but you had the opportunity to safely leave, by law do you have to exercise that opportunity," Griffin replied, "[y]ou should, sir."

C

To the extent any witness who actually testified to seeing the altercation that led to the shooting gave their opinion that deadly force was unwarranted

under the circumstances, those opinions were properly admitted under Evid.R. 701.

Although Ohio uses a subjective standard for self-defense, the state is not barred from offering testimony to counter what the defendant "subjectively" claims to have believed at the time. In *Koss*, the supreme court approved a jury instruction on the reasonableness of a defendant's use of deadly force that stated: "In determining whether the Defendant had reasonable grounds for an honest belief that she was in imminent danger, you must put yourself in the position of the Defendant \*\*\*. You must consider the conduct of [the assailant] and determine if such acts and words caused the Defendant to reasonably and honestly believe that she was about to be killed or to receive great bodily harm." *Id.*, 49 Ohio St.3d at 216. The supreme court later described this as "a combined subjective and objective test." *Thomas*, 77 Ohio St.3d at 330. This was consistent with previous decisions holding that a defendant's use of deadly force was to be viewed "on the grounds of the bona fides of defendant's belief, and reasonableness therefor, and whether, under the circumstances, he exercised a careful and proper use of his own faculties." *State v. Sheets* (1926), 115 Ohio St. 308, 310, 152 N.E. 664.

The opinions were offered by eyewitnesses who actually saw events unfold. The opinions were thus helpful to giving the jury a clear understanding

of whether Warmus could reasonably believe that deadly force was necessary and whether he exercised sound judgment in doing so. The court did not err by allowing the opinions into evidence.

D

Detective Lem Griffin did not witness the shooting, so he could not give a lay opinion as to whether Warmus was justified in using deadly force. See *Johnson*, 10th Dist. No. 02AP-373, at ¶36. At no point in Griffin's testimony, however, did the court permit him to give his opinion on whether Warmus was justified in shooting Williams — the detective only testified to his opinion of when a *police officer* could use deadly force under similar circumstances and that he did not believe that a headlock constituted an imminent threat on one's life. This might seem like a fine distinction to make, but the state's line of questioning to this witness was prompted by an assertion made in defense counsel's opening statement:

“The third thing that the evidence as a whole shows is that Mr. Warmus responded to the gun threat just as a police officer would have responded. We certainly expect that a police officer confronted with or confronting a suspect who has a gun pulled or even appears to be pointing a gun, we expect that police officer to shoot until the gun drops in self-defense, and that's what Matt did.”

By referencing what police officers would have done under similar circumstances, Warmus opened the door to testimony by police officers as to how they would have responded in a similar situation. Though opening statements of counsel are not evidence, *State v. Frazier*, 73 Ohio St.3d 323, 338, 1995-Ohio-235, 652 N.E.2d 1000, they usually state the defense's theory of the case. Defense counsel told the jury that the evidence would show that Warmus "responded to the gun threat just as a police officer would have responded." The state was thus entitled to offer police testimony to rebut that assertion by offering evidence from police officers to the effect that officers acting in similar circumstances would not have resorted to deadly force. Cf. *State v. Haines*, 112 Ohio St.3d 393, 2006-Ohio-6711, 860 N.E.2d 91, ¶44 (when a victim's credibility is attacked during opening statements, the prosecution can present rehabilitative evidence during the state's case-in-chief); *United States v. Marin* (C.A.1, 2008), 523 F.3d 24, 31. Griffin's testimony viably countered Warmus's assertion by showing that he, as a police officer, would not in similar circumstances have used deadly force. There was nothing improper about either the state's question or the detective's answer.

II

Warmus complains that the court erred by allowing a state expert to invade the province of the jury by testifying outside his area of expertise to an ultimate issue to be decided by the jury. The witness, an expert in audio and video technology, examined a recording of a 911 call placed on the scene of the shooting. He testified that after optimizing the audio track for clarity, he could hear Warmus arguing with a bystander saying, "if my gun's here, it's my fault." Warmus disagreed with the expert's conclusion, offering his own transcription of the 911 call in which he claimed he said, "[i]t's his gun. Why are you going to say it's my fault. Why?" He maintains that the jury should have been allowed to draw its own conclusions about what words were spoken.

An audio recording made contemporaneously with events is always the best evidence of that event. *Harleysville Mut. Ins. Co. v. Santora* (1982), 3 Ohio App.3d 257, 260-61, 444 N.E.2d 1076. The court may in its discretion allow a transcript of an audio recording to be presented to the jury as a *listening aid* as long as there are no material differences between the recording and the transcript. *State v. Waddy* (1992), 63 Ohio St.3d 424, 445, 588 N.E.2d 819. When a party disputes the accuracy of a transcribed recording, a person who was present and who heard the conversation in question at the time the recording was made may testify for the purpose of clarifying inaudible or

unintelligible portions of the tape. See Evid.R. 602; *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215, ¶100; *State v. Gearo* (July 1, 1993), 8th Dist. No. 63056.

The state's expert was not present at the scene when the 911 call was made. Nevertheless, courts have allowed expert testimony to clarify garbled or unintelligible audio recordings. In *State v. Williams* (1983), 4 Ohio St.3d 53, 446 N.E.2d 444, the syllabus states:

"The Ohio Rules of Evidence establish adequate preconditions for admissibility of expert testimony, such as spectrographic voice analysis. It is within the sound discretion of the state's judiciary, on a case by case basis, to decide whether such testimony is relevant and will assist the trier of fact to understand the evidence or to determine a fact in issue."

The state's expert testified that he enhanced the audio on the recording of the 911 call, and Warmus does not contest the manner in which the 911 call was enhanced. He does, however, contest the expert's interpretation of the words spoken. He claims that expertise in filtering audio recordings is not the same thing as expertise in being able to decipher words. He argues that the expert failed to explain how his training and background gave him the ability to interpret the words spoken on the audio recording.

The court should not have allowed the expert to render an opinion as to what words he heard spoken on the tape. Because Warmus and the state fundamentally disagreed on what words were spoken, this became a factual issue for the jury to resolve. The court should have instructed the jury that the interpretation of what words were spoken on the 911 tape were for it to decide and that the audio recording was the best evidence.

Despite this error, we cannot say that it was prejudicial. Having independently reviewed the audio of the 911 call, we cannot confidently say that either interpretation by the state or defense was completely accurate. The jury heard the audio and was able to compare it to the transcriptions made by both parties and weigh them against the actual recording. Moreover, to the extent the jury may have given undue weight to the expert's conclusions, that error was certainly harmless given the overwhelming evidence of Warmus's guilt. Even had the court excluded the expert's testimony, there is no probability that the outcome of the trial would have been different.

### III

The coroner testified that Williams had been shot twice in the abdomen and once behind the left ear. The state later made several references to the shot behind the ear as an "execution-style" shooting; for example, asking Warmus during cross-examination: "Where did you learn that type of military

style execution?" Warmus complains that continued references to the shot behind the victim's ear as an "execution" style shot constituted prosecutorial misconduct.

A

We analyze claims of prosecutorial misconduct by determining "whether remarks were improper and, if so, whether they prejudicially affected substantial rights of the accused." *State v. Jones*, 90 Ohio St.3d 403, 420, 2000-Ohio-187, 749 N.E.2d 300, citing *State v. Smith* (1984), 14 Ohio St.3d 13, 14, 470 N.E.2d 883. Ultimately, this means we must determine whether "the conduct complained of deprived the defendant of a fair trial." *State v. Fears*, 86 Ohio St.3d 329, 332, 1999-Ohio-111, 715 N.E.2d 136, citing *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 24, 514 N.E.2d 394.

B

One of Warmus's gunshots struck Williams behind the left ear, leaving what the coroner described as a "neurologically incapacitating wound" that severed the victim's brainstem. Both the coroner and trace evidence expert found stippling (or gunshot residue) near the wound, indicating that Warmus had fired the gun from a distance of between 12 and 24 inches from the victim. Although Warmus claimed he had only been aiming at the victim's gun, there was evidence that the three shots he fired were "two initial shots, a pause, and

then a final third shot.” The gunshots to the abdomen were located no more than a quarter of an inch apart, implying that they had been fired in quick succession. The third shot thus could have corresponded to the bullet wound near the victim’s ear.

Given the entry point of the bullet at the back of the head and the close proximity from which the gun was fired, the state’s remarks about an “execution-style” shooting were not improper. Courts have previously described similar shootings as “execution-style.” For example, in *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, the supreme court described four gunshots, at least three of which were “at close range, to the head” as an “execution-style” murder. *Id.* at ¶139. See, also, *State v. Palmer*, 80 Ohio St.3d 543, 570, 1997-Ohio-312, 687 N.E.2d 685 (describing as “execution-style manner” shots fired on either side of the victim’s head into his temple).

Assuming that the shot to back of the victim’s head followed the two quick shots to the abdomen, it could be inferred that there was a slight pause as the victim’s body twisted from the initial shots. This pause, however momentary, could have allowed Warmus to aim his gun at the back of the victim’s head. Under this scenario, Warmus could accurately be said to have fired a “kill” shot or have engaged in an execution-style shooting. The state did not commit misconduct by so characterizing the shot to the back of the head.

Warmus next argues that the state committed misconduct by creating the impression that he illegally transported his firearm, despite not being charged with that offense. The state argues that this was other acts evidence under Evid.R. 404(B) and properly introduced to counter Warmus's assertion on direct examination that the "most trouble" he had been in before the shooting was "a speeding ticket."

Questions about Warmus's transportation of a loaded firearm did not reasonably fall within any exception to the prohibition on other acts evidence under Evid.R. 404(B). They did not touch on "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The state cites to no exception for admissibility under the rule, nor can we discern any plausible basis for application of the rule.

The questions were likewise inadmissible to impeach Warmus on his assertion that he led a law-abiding life. R.C. 2923.16(B) defines the offense of improperly handling firearms in a motor vehicle and states: "No person shall knowingly transport or have a loaded firearm in a motor vehicle in such a manner that the firearm is accessible to the operator or any passenger without leaving the vehicle." Warmus testified that he took firearms seriously and that he received training in firearm use and handling, but was unaware that it was

illegal to transport a loaded firearm in a vehicle when that firearm was within reach of the driver or passenger. The state now claims that “it did not create the impression that the Appellant illegally transported a firearm in his vehicle,” Appellee’s Brief at 23, but this claim belies what transpired at trial. The state asked Warmus whether he was “familiar” with R.C. 2923.16(B) and later said, “you had no idea that it was illegal to convey a loaded weapon?” Finally, the state characterized Warmus’s act of transporting a loaded gun inside the car as “committing a crime by conveying it[.]” These questions created the impression that Warmus had broken the law, as the phrase “committing a crime” allows for no other reasonable conclusion but that Warmus illegally transported a firearm.

Despite the error in the state’s questions, we cannot find them so prejudicial that they deprived Warmus of a fair trial. Warmus conceded that he shot the victim, so questions about whether he illegally transported his firearm paled by comparison. We do not think it is remotely possible that questions about Warmus’s illegally transporting the gun somehow swayed the jury into rejecting the self-defense claim. Any misconduct by the state was thus harmless beyond a doubt.

D

Warmus raises other claims of prosecutorial misconduct, but does not separately argue why these claimed instances deprived him of a fair trial. This

constitutes a failure under App.R. 16(A)(7), which requires the appellant to raise an argument “with respect to each assignment of error presented for review and the reasons in support of the contentions.”

#### IV

The fourth assignment of error complains that R.C. 2901.05(A), which requires the defendant to bear the burden of proof when raising a self-defense claim, is unconstitutional. We assume that Warmus raises this assignment only to preserve it for further federal review because the United States Supreme Court approved R.C. 2901.05(A) in *Martin v. Ohio* (1987), 480 U.S. 228, 233-234, 107 S.Ct. 1098, 94 L.Ed.2d 267. As an inferior court to the United States Supreme Court, we have no ability to overturn *Martin*.

Warmus argues that *Martin* should be reviewed in light of the United States Supreme Court’s decision in *Dist. of Columbia v. Heller* (2008), 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637, in which the supreme court held that the Second Amendment to the United States Constitution conferred an individual right to keep and bear arms; that statutes banning handgun possession in the home violated the Second Amendment; and that any statute containing a prohibition against rendering any lawful firearm in the home operable for purposes of immediate self-defense violated the Second Amendment. *Heller* also held that the right to self-defense was a “central component” to the right

to bear arms, *id.* at 599 (emphasis omitted), so Warmus argues that placing the burden of proof on a person claiming to act in self-defense runs counter to the purpose of the Second Amendment.

Courts have, in light of *Heller*, been analyzing Second Amendment claims under a two-prong approach. For example, in *United States v. Marzzarella* (C.A.3, 2010), 614 F.3d 85, the United States Court of Appeals for the Third Circuit stated:

“As we read *Heller*, it suggests a two-pronged approach to Second Amendment challenges. First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee. Cf. *United States v. Stevens*, 533 F.3d 218, 233 (3d Cir.2008), *aff’d* \_\_\_ U.S. \_\_\_, 130 S.Ct. 1577, 176 L.Ed.2d 435 (recognizing the preliminary issue in a First Amendment challenge is whether the speech at issue is protected or unprotected). If [the law] does not [impose such a burden], our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid.” *Id.* at 89 (footnote omitted). See, also, *United States v. Chester* (C.A.4, 2010), 628 F.3d 673, 680 (a “two-part approach to Second Amendment claims seems appropriate under *Heller* \*\*\*.”); *United States v.*

*Reese* (C.A.10, 2010), 627 F.3d 792, 800-801 (same); *United States v. Skoien* (C.A.7, 2010), 614 F.3d 638, 641-642 (en banc).

Nothing in R.C. 2901.05(A) imposes a burden on conduct protected by the Second Amendment. It is important to understand the distinction between the right to carry a firearm (which Warmus lawfully exercised at the time of the shooting) against the limits the law places on how one can defend oneself. At the time of the amendment's framing, prevailing attitudes on self-defense required a duty to "retreat to the wall" in cases that did not involve the defense of one's home. See *Erwin v. State* (1876), 29 Ohio St. 186, 194. While the duty to retreat has been rejected by many states in modern times, see Forell, What's Reasonable?: Self-Defense and Mistake in Criminal and Tort Law (Winter 2010), 14 Lewis & Clark L.Rev. 1401, 1403, fn. 5, it undeniably existed when the Second Amendment was adopted. That Ohio continues to require a duty to retreat before the use of deadly force in self-defense has no impact on Warmus's right to possess a firearm.

The Ninth Appellate District recently addressed and rejected this same argument in *State v. Geter-Grey*, 9th App. No. 25374, 2011-Ohio-1779, finding that *Heller* "did not in any way modify the underlying right to self-defense." *Id.* at ¶26. We agree, as nothing in *Heller* purports to alter the way the states have defined self-defense. It recognizes there is a right to self-defense and, at best,

stands for the proposition that whenever the use of deadly force is justified when acting in self-defense, a person can use "arms," including firearms.

V

For his fifth assignment of error, Warmus complains that the court erred by failing to conduct a hearing pursuant to *Remmer v. United States* (1954), 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654, after the trial judge told the parties that he gave a juror a ride to the courthouse during the trial.

The judge explained on the record that while driving to the courthouse he received a telephone call informing him that an alternate juror was unable to find transportation to the courthouse. Knowing that the defense was presenting expert witnesses with a very tight window of availability and that one juror was about to give birth to a child, the judge decided to meet the juror and give him a ride to the courthouse. The judge said that he dropped the juror off in front of the Justice Center before proceeding to park his car. The court waited until the two expert witnesses testified before informing the parties. The court assured the parties that "at no time did I have any conversation with this juror about any aspect of this case. We didn't mention the trial, no Matthew Warmus or any witnesses or anything with this case at all." The court told the parties that "I will permit you all to think about it and motion it if you wish" and further told them that he would "permit you to depose the juror at

the conclusion of the litigation if you wish.” Neither party objected nor did Warmus depose the juror at the end of trial.

In *Remmer*, the United States Supreme Court stated:

“In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in the pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.” *Id.* at 229.

Nonetheless, “due process does not require a new trial every time a juror has been placed in a potentially compromising situation. \*\*\* Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a hearing like that ordered in *Remmer* \*\*\*.” *Smith v. Phillips* (1982), 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed.2d 78.

Warmus did not object to the court’s actions when given a clear opportunity to do so, therefore he has forfeited the right to argue anything but

plain error on appeal. See *State v. Lewers*, 5th Dist. No. 2009-CA-00289, 2010-Ohio-5336, ¶78. We find no plain error. *Remmer* creates a presumption that any contact or communication about “the matter pending before the jury” is prejudicial. The judge clearly understood this rule of law and made it clear to the parties that he and the juror did not discuss the case — they spoke about a football game and other sports. It may have been better for the court to arrange for someone else to drive the juror to the courthouse, but the judge took pains to prevent any conversation about the trial. Moreover, it is difficult for Warmus to argue that he was prejudiced by the court’s actions when those actions undeniably assisted the defense — one of Warmus’s experts could only testify between 9 a.m. and 12 p.m. that day. Had the court been forced to postpone trial for a day or even a few hours, the expert would not have been available. By giving the juror a ride, the court ensured that Warmus could offer the expert’s testimony.

## VI

During the direct examination of a police officer, who along with two other officers were the first law enforcement officials to arrive on the scene, the officer testified that he heard Warmus’s companion say “I knew bad things were going to happen.” The court allowed the statement into evidence as an excited utterance. Warmus argues that the companion’s statement did not meet the

requirements for being an excited utterance because the statement was too remote in time to the startling event.

A

Although hearsay, excited utterances are excepted from the hearsay rule under Evid.R. 803(2) as long as the statement relates to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. In *State v. Duncan* (1978), 53 Ohio St.2d 215, 373 N.E.2d 1234, the Ohio Supreme Court established a four-part test to determine whether a hearsay statement is admissible under Evid.R. 803(2): the proponent of the statement must establish that (1) there was an event startling enough to produce a nervous excitement in the declarant, (2) the statement must have been made while under the stress of excitement caused by the event, (3) the statement must relate to the startling event, and (4) the declarant must have had an opportunity to personally observe the startling event. *Id.* at paragraph one of the syllabus, approving and following *Potter v. Baker* (1955), 162 Ohio St. 488, 124 N.E.2d 140, paragraph two of the syllabus. As with other kinds of evidentiary rulings where the court is required to make a factual finding as a predicate for admitting evidence, the court's finding that a statement qualifies as an excited utterance is within its discretion, reviewable only for an abuse of that discretion. *State v. Graham* (1979), 58 Ohio St.2d 350, 390 N.E.2d 805.

The victim's shooting was a startling event to Warmus's companion. Her statement related to the shooting and she personally witnessed the shooting. The only point of contention is the second element — whether the statement had been made while she was under the stress of excitement caused by the event.

The evidence showed that the police responded to the scene within moments of the shooting — Warmus himself testified that he was still on the telephone with the 911 operator when the police arrived. The officer who related the companion's statement said that he looked into the open trunk of Warmus's car, saw the gun, and moved to secure it. At the same time, Warmus's companion tried to retrieve her purse from the trunk. The officer "yelled at [her] not to go in the trunk," at which time she "fell to pieces," collapsed on the ground beside the trunk, and said words to the effect that she knew "when [Warmus] went to the trunk of the car that bad things were going to happen[.]" The officer said that by "falling to pieces" he meant that she became "hysterical" when told that she could not retrieve her purse from the trunk of Warmus's car.

We cannot find that the court's decision to admit the companion's statement as an excited utterance was an abuse of discretion. The evidence showed that police responded almost immediately after the shooting and the

court could rationally have concluded that the companion was still in an excited condition after having witnessed a shooting death just moments earlier. As Warmus concedes, there are no rigid rules for determining what length of time constitutes too much time for the kind of reflection that would qualify a statement as spontaneous. *Duncan*, 53 Ohio St.3d at 219-220. Given the “hysterical” nature of the companion’s response to being told not to retrieve her purse, spontaneity seemed assured as it was unlikely that her comment had been the product of conscious thought. Instead, it was an organic comment, made under the stress of having witnessed Warmus shoot a parking lot attendant over a \$10 dispute, and thus one the trustworthiness of which seemed unassailable. The court was acting well within its discretion by allowing the companion’s statement into evidence as an excited utterance.

B

Warmus also complains that even if the statement qualified as a hearsay exception, the state could not use it as extrinsic evidence to impeach the companion, who earlier denied making the statement.

Extrinsic evidence is inadmissible to impeach a witness on a collateral matter having no bearing on the issue to be decided at trial. See *State v. Smith*, 10th Dist. No. 04AP-726, 2005-Ohio-1765, ¶39. Extrinsic evidence may be admissible to impeach a witness under Evid.R. 616(C), but only if the extrinsic

evidence is permitted by Evid.R. 608(A), 609, 613, 616(A) or (B), or 706, or by the common law of impeachment not in conflict with the Rules of Evidence. *State v. Spence*, 10th Dist. No. 05AP-891, 2006-Ohio-6257, ¶62.

But we need not decide whether the state improperly used the officer's testimony to impeach the companion because while "testimony may be inadmissible for some purposes, it may also be found admissible for other purposes." *Buck v. Dayton Heidelberg Distrib. Co., Inc.* (Nov. 29, 1983), 2d Dist. No. 8067. When the state offered the officer's testimony, Warmus objected on impeachment grounds, but the state claimed that it was offering the testimony as an excited utterance. The court specifically admitted the statement as an excited utterance, a decision we have found was not an abuse of discretion. Because the statement was admissible for that purpose, it is immaterial whether it violated any other rules of evidence.

## VII

In his seventh assignment of error, Warmus complains of several instances in which he claims the court unfairly restricted his ability to cross-examine numerous state witnesses. These "numerous" state witnesses were, in fact, only two in number: Eric Livingstone and Detective Lem Griffin. We restrict our discussion accordingly.

A

The Fifth and Sixth Amendments concomitantly provide a criminal defendant the right to present a defense by compelling the attendance and presenting the testimony of witnesses for the defense. *Washington v. Texas* (1967), 388 U.S. 14, 18-19, 87 S.Ct. 1920, 18 L.Ed.2d 1019. In addition, “[t]he necessary ingredients of the [Fifth and] Fourteenth Amendment[s]’ guarantee that no one shall be deprived of liberty without due process of law include a right to be heard and to offer testimony[.]” *Rock v. Arkansas* (1987), 483 U.S. 44, 51, 107 S.Ct. 2704, 97 L.Ed.2d 37.

The right to present a criminal defense, however, is not absolute. *United States v. Valenzuela-Bernal* (1982), 458 U.S. 858, 875, 102 S.Ct. 3440, 73 L.Ed.2d 1193. The defendant is entitled to only “an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” *Delaware v. Fensterer* (1985), 474 U.S. 15, 20, 106 S.Ct. 292, 89 L.Ed.2d 674. Accordingly, the court has “wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.” *Delaware v. Van Arsdall* (1986), 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674. To establish

a Confrontation Clause violation, the defendant must show that he was “prohibited from engaging in otherwise appropriate cross-examination” and “[a] reasonable jury might have received a significantly different impression of [the witness’s] credibility had [the defendant’s] counsel been permitted to pursue his proposed line of cross-examination.” *Id.* at 680.

B

Livingstone gave his opinion that Warmus was not in any danger at the time he retrieved his gun and shot the victim. On cross-examination, defense counsel asked: “Now, from your vantage point, when you say this all happened and you say that you never saw [the victim] pull or point a gun, you must be surprised ultimately to find out the [the victim] actually had a gun out before he was shot?” The court sustained the state’s objection and ordered defense counsel to rephrase the question. Defense counsel then asked, “[w]ere you surprised to find out ultimately that [the victim] in fact had a gun out before he was shot?” The state again objected. At the sidebar, the court told defense counsel that he was mischaracterizing prior testimony by an emergency medical technician. The court told defense counsel: “I’ll permit you to ask do you know if a gun was found, do you know when the gun came out, do you know if the gun was out before he was shot, but to say that the EMS guy said the gun was out before he was shot is not technically accurate.” Defense counsel told the court

that he had the right to ask any question on cross-examination and that he was “not tying it into what the EMS person said.” Defense counsel admitted to the court that up to that point in the trial, no person had testified to seeing the victim having “a gun out.”

As defense counsel was forced to concede, there had been no testimony prior to that point in trial where any witness claimed to have seen Williams holding a gun. During questioning of the emergency medical technician who treated the victim on the scene, he responded to the question, “[b]ut you definitely recall seeing a gun near [the victim’s] head on the pavement,” by saying, “I did not see a weapon.” So any question posed to Livingstone that presumed that the victim “actually had a gun out before he was shot” had no basis in fact. The court did not abuse its discretion by sustaining the state’s objection to it because the question had the potential to confuse the jury by injecting facts not in the record. Moreover, Livingstone’s testimony that Warmus could have safely retreated without shooting Williams was premised on his opinion that he did not see Williams holding a gun and that Warmus was in no danger from Williams. Even had Livingstone been aware that the victim possessed (but did not display) a gun, that fact would have been immaterial to his conclusion that Warmus was not in any danger at the time he went to his trunk and retrieved his gun.

During Detective Lem Griffin's testimony, he gave his understanding of the circumstances under which a police officer would be justified in using deadly force. On cross-examination, Griffin acknowledged that he was not a lawyer and defense counsel asked, "[s]o the legal opinions you just expressed are not the opinions of a lawyer." The court sustained the state's objection.

The court did not abuse its discretion by sustaining the objection. Griffin's opinions were based on questions premised on the idea of how a police officer would have responded in the same situation — a premise first put forth by Warmus in opening statement when he claimed that he responded to the victim's threat in the same way a police officer would have responded. Griffin's opinion was thus grounded on his personal experience as a police officer, not as an attorney, a fact he readily acknowledged in his testimony. Defense counsel's question was thus misleading and arguably intended to confuse the jury on issues that were not relevant. In any event, by conceding that he was not an attorney, Griffin arguably answered the defense's question about whether his opinions were that of a lawyer. Warmus can show no prejudice.

## VIII

Warmus next complains that the court gave an inaccurate jury instruction on self-defense.

Before closing argument, the court gave this preliminary instruction to the jury:

“If you find that the *State* proved beyond a reasonable doubt all of the essential elements of the offense of self-defense against the danger of death or great bodily harm, and if you further find that the defendant failed to prove by a preponderance of the evidence the defense of self-defense, then your verdict must be guilty, so on the other hand, if you find the *State* failed to prove beyond a reasonable doubt any one of the essential elements of the offense of self-defense against danger of death or great bodily harm, or if you find that the defendant proved by a preponderance of the evidence the defense of self-defense, then you must find the defendant not guilty.” (Emphasis added.)

Warmus complains, and the state agrees, that the court erroneously transposed the word “state” for “defendant” in the instruction, thus creating confusion as to the proper law the jury was to apply in its deliberations. Importantly, however, Warmus did not object to the court’s instruction. Crim.R. 30 prohibits an appealing party from assigning as error the giving of a jury instruction unless a party objected to the instruction before the jury retired to consider its verdict. When there is a failure to object as required by Crim.R. 30, the allegedly faulty instruction is subject to review only for plain error. *State v. Adams* (1980), 62 Ohio St.2d 151, 154, 404 N.E.2d 144. Plain error exists

only if “the outcome of the trial clearly would have been otherwise.” *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph two of the syllabus.

Although the court’s preliminary instruction erroneously told the jury that the state bore the burden of proving self-defense, the court made it clear to the jury that written instructions would be provided for their use and stated, “you’ll be able to refer to it and review it as often as you like, okay?” Those written instructions correctly stated that Warmus bore the burden of proving self-defense by a preponderance of the evidence. Given the strength of the evidence against Warmus’s claim of self-defense, we have no reason to believe that the jury based its conclusion on an erroneous transposition about who bore the burden of proof.

## IX

The ninth assignment of error is that counsel was ineffective for failing to request a *Remmer* hearing and for failing to object to the jury instruction regarding the burden of proof on self-defense.

### A

A claim of ineffective assistance of counsel requires a defendant to show that (1) the performance of defense counsel was seriously flawed and deficient and (2) the result of the defendant’s trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v.*

*Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. This analysis requires two distinct lines of inquiry. First, we determine “whether there has been a substantial violation of any of defense counsel’s essential duties to his client[.]” *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus. When making this inquiry, we presume that licensed counsel has performed in an ethical and competent manner. *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 209 N.E.2d 164. Second, we determine whether “the defense was prejudiced by counsel’s ineffectiveness.” *Bradley*, 42 Ohio St.3d at paragraph two of the syllabus. Prejudice requires a showing to a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Id.* at paragraph three of the syllabus.

## B

Although counsel did not request a *Remmer* hearing upon learning that the trial judge gave an alternate juror a ride to the courthouse, we stated in our discussion of the fifth assignment of error that a *Remmer* hearing was unnecessary because the judge made it clear that he did not discuss anything about the case with the juror. The judge explained that he studiously avoided any conversation relating to the case. Defense counsel had no reason to doubt the court’s recapitulation of the conversation and offered no objection to the way

the court handled the matter. Defense counsel thus exercised his judgment that no impropriety occurred. Even were we of a mind to second-guess this decision, nothing on the record suggests to us that the court's explanation was so lacking in veracity that a full *Remmer* hearing was necessary.

C

Regarding the preliminary jury instruction on self-defense, we agreed that the court erred by transposing the word "state" for "defendant" when assigning the burden of proving self-defense. Counsel had an obligation to object to this instruction under Crim.R. 30 and failed to do so, thus violating an essential duty.

We nonetheless find that even had the court correctly stated the burden of proof in its preliminary instructions to the jury, there is no reasonable probability that the outcome of the trial would have been different. The evidence overwhelmingly showed that Warmus could have safely retreated without resorting to deadly force. Indeed, while the victim did possess a firearm, none of the many eyewitnesses to the shooting saw that weapon. At best, one witness, who worked with the victim, said only that he "tried to reach for his gun" at the time he was shot, but that he did so only because Warmus had first pulled out his own gun.

Warmus was the only witness to say that the victim pulled the gun first, a claim that was self-interested and against the great weight of the testimony. Every other witness agreed that the fight had ended and that the victim had turned away from Warmus and resumed tending to parking lot customers. Warmus could have easily and safely retreated without resorting to deadly force. And if Williams had pulled a gun first, it is unclear how Warmus thought it believable that he could walk to his car, retrieve his gun, and return to Williams while aiming a gun at him. If Williams had manifested an immediate intention to shoot Warmus, surely Warmus would not have risked walking to the trunk of his car to get a gun, all the while being held at gunpoint himself. The jury obviously found Warmus's version of events unbelievable.

Finally, to the extent the court erred in instructing the jury on the burden of proof, it is difficult to see how that error was prejudicial to Warmus. In his fourth assignment of error he complained that Ohio's statutory requirement that a defendant bear the burden of proof on self-defense was unconstitutional because the burden should rest with the state. Assuming that the jury did put the burden of proving self-defense on the state, it inadvertently gave Warmus what he wished for all along. Even if the instruction did confuse the jury, that confusion would undoubtedly have worked in Warmus's favor as it might have caused the jury to split on whether he or the state proved the elements of self-

defense. He cannot now complain that he was prejudiced by the court's error and we find no basis for finding that the outcome of the trial would have been different had the jury been correctly instructed.

X

The tenth assignment of error is that cumulative errors deprived Warmus of a right to a fair trial.

The "cumulative error" doctrine states that "a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of the numerous instances of the trial court error does not individually constitute cause for reversal." *State v. Garner*, 74 Ohio St.3d 49, 64, 1995-Ohio-168, 656 N.E.2d 623. However, "[t]here can be no such thing as an error-free, perfect trial, and \*\*\* the Constitution does not guarantee such a trial." *State v. Hill*, 75 Ohio St.3d 195, 212, 1996-Ohio-222, 661 N.E.2d 1068, quoting *United States v. Hasting* (1983), 461 U.S. 499, 508-509, 103 S.Ct. 1974, 76 L.Ed.2d 96.

As we have previously discussed, the only demonstrable errors we have found to this point are the court's decision to allow an audio expert to testify to his interpretation of words spoken on an audio recording of a 911 call, the state's misconduct in questioning Warmus about the illegal transportation of a firearm, and the court's inadvertent transposition of which party bore the

burden of proving self-defense. These errors neither adversely affected the outcome of trial nor did they cumulatively affect Warmus's right to a fair trial.

XI

Finally, Warmus complains that the court erred as a matter of law by imposing a fine of \$20,000, claiming that under R.C. 2929.02(B)(4) the maximum allowable fine for murder is \$15,000. The state concedes the court's error and we agree. We therefore sustain this assignment of error and remand with instructions for the court to modify the fine to \$15,000.

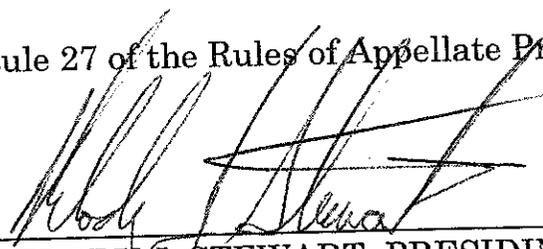
This cause is affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

It is ordered that the parties bear their own costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

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

  
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MELODY J. STEWART, PRESIDING JUDGE

COLLEEN CONWAY COONEY, J., and  
SEAN C. GALLAGHER, J., CONCUR