

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 2012-0830
	:	
Plaintiff-Appellee,	:	On Appeal from the Summit
	:	County Court of Appeals,
v.	:	Ninth Appellate District
	:	
TYRAN DAVIS,	:	Court of Appeals
	:	Case No. C.A. 25826
Defendant-Appellant.	:	

REPLY BRIEF OF APPELLANT TYRAN DAVIS

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STATEMENT OF THE CASE AND FACTS

Mr. Davis relies upon the Statement of the Case and Facts contained in his merit brief.

ARGUMENT

Proposition of Law No. I

If a defendant stands trial under two or more murder theories for a single homicide, acquittal on one murder theory does not preclude a finding of prejudice resulting from the trial court's improper failure to instruct on an offense of an inferior degree associated with the theory of acquittal.

The trial court's improper refusal to give a voluntary manslaughter instruction was not harmless. The dissenting opinion in the lower court realized that the jury considers all of the charges simultaneously and that prejudice *can* result from a failure to give an inferior-degree instruction in regard to a murder charge that did not result in a guilty finding under the circumstances in the present case. *State v. Davis*, 9th Dist. No. 25826, 2012-Ohio-1440 at ¶ 28. The trial court's error prejudiced Mr. Davis, as the jury was precluded from considering an alternative lesser offense to the one he was convicted of having committed.

The jury instructions did not require the jury to first consider one form of murder and then the next. (Jan. 10, 2011, Tr. pp. 661-673.) As a result, all the evidence would be considered simultaneously for all of the offenses. The prejudice resulting from the trial court's failure to give a voluntary manslaughter instruction is particularly salient in the present case, as all of the charges against Mr. Davis arose from a single criminal act. A fact that is highlighted by the trial court's merger of the actual offenses of conviction for sentencing purposes. (May 17, 2012, Journal Entry.)

Taken together, the proffered and the admitted evidence more closely fit a voluntary manslaughter verdict than a felony murder verdict. Evidence was admitted at trial demonstrating the egregiousness of Mr. Myers's actions, and that evidence supported a voluntary manslaughter instruction. Mr. Myers punched a pregnant woman with a closed fist and with sufficient force to knock her to the ground and leave her apparently unconscious. *Davis* at ¶ 6. In doing so, Mr. Myers endangered the life of Mr. Davis's unborn child. And the number of shots fired by Mr. Davis suggested an intent to kill. See, e.g., *State v. Strodes*, 48 Ohio St.2d 113, 357 N.E.2d 375 (1974), *vacated in part on other grounds*, 438 U.S. 911, 98 S.Ct. 3135, 57 L.Ed.2d 1154 (1978) ("The number of shots fired, the places where the bullets entered the body, and the resulting wounds are all probative evidence of a purpose to cause death."). In addition, the proffered evidence about Mr. Davis's angered state of mind, as a result of Mr. Myers's actions, tended to fit more closely with a voluntary manslaughter verdict than with a felony murder verdict.

The appellate court's approach does not give appropriate weight to the fact that all of the offenses at issue involved the same conduct. Nor does that court recognize that the jury could reasonably have found voluntary manslaughter to better fit that conduct than felony murder, had the jury received an instruction regarding the inferior-degree offense of voluntary manslaughter.

Proposition of Law No. II:

Because fundamental fairness requires that criminal defendants be afforded a meaningful opportunity to present a complete defense, a trial court may not deny a defendant's request for an instruction to an inferior-degree offense after direct testimony is given to support such an instruction.

Mr. Davis relies upon the analysis contained in his merit brief regarding Proposition of Law No. II.

CONCLUSION

This Court should reject the appellate court's overly narrow view of when prejudice may be found regarding inferior-degree offense instructions, so that the error here is remedied, and so that it is not repeated in future similar cases. This Court should adopt the analysis and conclusions of the dissent in *Davis* and remand this case for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **REPLY BRIEF OF APPELLANT TYRAN DAVIS** was sent via regular U.S. mail, postage prepaid to Richard Stephen Kasay, Summit Assistant County Prosecutor, 53 University Avenue, 7th Floor, Safety Bldg., Akron, Ohio 44308, on this 22th day of November, 2012.

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