

ORIGINAL

IN THE SUPREME COURT OF OHIO

13-0109

STATE OF OHIO,

* Case No. L-13-0109

Plaintiff-Appellant,

* C.A. Case No. L-10-1194.
* C.P. Case No. CR 09-2300

-vs-

*

THOMAS CAINE WHITE,

* APPEAL FROM THE LUCAS COUNTY
* COURT OF APPEALS,
* SIXTH APPELLATE DISTRICT

Defendant-Appellee.

REPLY BRIEF OF PLAINTIFF-APPELLANT

JULIA R. BATES, PROSECUTING ATTORNEY
LUCAS COUNTY, OHIO
By: Evy M. Jarrett, #0062485 (Counsel of Record)
Assistant Prosecuting Attorney
Lucas County Courthouse
Toledo, Ohio 43624
Phone No: (419) 213-4700
Fax No: (419) 213-4595
emjarrett@co.lucas.oh.us
ON BEHALF OF PLAINTIFF-APPELLANT

OFFICE OF THE OHIO PUBLIC DEFENDER
Peter Galyardt, #0085439 (Counsel of Record)
Assistant Public Defender
250 East Broad Street - Suite 1400
Columbus, Ohio 43215
Phone No: (614) 466-5394
Fax No: (614) 752-5167
peter.galyardt@opd.ohio.gov
ON BEHALF OF DEFENDANT-APPELLEE

DEAN HOLMAN, PROSECUTING ATTORNEY
MEDINA COUNTY, OHIO
By: Matthew A. Kern, #0086415
72 Public Square
Medina, Ohio 44256
Phone No: (330) 723-9536
Fax No: (330) 723-09532
mkern@medinaco.org
ON BEHALF OF AMICUS CURIAE
OHIO PROSECUTING ATTORNEYS
ASSOCIATION

Larry H. James, #0021773
Christina L. Corl, #0067869
Daniel J. Hurley, #0034499
Crabbe, Brown & James, LLP
500 South Front Street, Suite 1200
Columbus, Ohio 43215
Phone No: (614) 228-5511
ON BEHALF OF AMICUS CURIAE,
THE NATIONAL FRATERNAL ORDER OF
POLICE

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CLERK OF COURT
SUPREME COURT OF OHIO

Paul L. Cox, #0007202
222 East Town Street
Columbus, Ohio 43215
Phone No: (614) 224-5700
Fax No: (614) 224-5775
pcox@fopohio.org

ON BEHALF OF AMICUS CURIAE,
THE NATIONAL FRATERNAL ORDER OF POLICE
AND FRATERNAL ORDER OF POLICE OF OHIO, INC.

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INTRODUCTION

Thomas White shot Michael McCloskey during a routine traffic stop in the village of Ottawa Hills. The shooting did not occur in a high crime area or in a jurisdiction plagued with on-duty police fatalities.¹ The shooting did not occur while White was investigating a crime likely to involve firearms. No frightened citizens or other law enforcement officers reported that McCloskey appeared to be armed with a gun. *Compare Anderson v. Russell*, 247 F.3d 125, 128 (4th Cir.2001); and *McLenagan v. Karnes*, 27 F.3d 1002, 1008 (4th Cir.1994).

There was no evidence at trial that Ottawa Hills suffers from "an atmosphere increasingly proliferated with criminals armed with every manner of firearm, including assault rifles and machine guns." (Amicus Brief at p. 6.) To the contrary, even White acknowledged that the village was "pretty quiet" at the time of the shooting. In fact, the village was so quiet that only two police officers were required to maintain order during the late night and early morning hours. On the night of the shooting, one officer was investigating a noise complaint while White patrolled the streets. White followed Michael McCloskey and Aaron Snyder not because they were suspected of committing criminal activity, but rather to see whether they might exhibit signs of impairment as they rode through the village. (Trial Transcript, "TT" at pp. 391-393, 836, 856.)

As White followed McCloskey and Snyder, they stopped at three intersections. No pedestrians or other automobiles were present on the roadway as the motorcycles progressed

¹Amicus' own authority fails to report any shooting fatalities of on-duty officers in the Ottawa Hills Police Department. National Law Enforcement Officers Memorial Fund, *Officer List*, http://www.nleomf.org/officers/search/officer-list.html?state=oh&reason=SHOT&race=&sex=&age_range=&service_range=&dateType=date_of_death&startDate=&endDate= (accessed Oct. 17, 2013.)

through the village. After the third stop sign, they accelerated to reach an average speed of 38 or 39 miles per hour. White activated his lights and siren about five seconds after the motorcycles left the stop bar, and McCloskey stopped 16 seconds later. After McCloskey stopped, while still straddling a large motorcycle, he made two movements. First, he raised his right hand to his head and then lowered his hand as he turned to look behind him over his right shoulder. White acknowledged that the first movement did not cause him any fear. However, after White yelled, McCloskey looked back over his shoulder with his hand resting on his thigh. Upon that movement -- a movement less pronounced than a movement required to retrieve an operator's license from a wallet -- White shot McCloskey in the back. (TT 344, 355-356, 633-634, 872-873, 883-886; Video Recording 2:16.55-2:16.57.)

White and his amicus now contend that the shooting was a valid seizure under the Fourth Amendment because police officers are authorized and required to enforce laws. The State does not dispute that police officers are empowered to enforce Ohio's statutes and the ordinances of their territorial jurisdiction. *See* R.C. 2935.03(A)(1). However, that grant of authority is subject to constitutional limits. That grant of power may not be read broadly to authorize any and all force in response to any violation of any law. *See Tennessee v. Garner*, 471 U.S. 1, 85 L.Ed.2d 1, 105 S.Ct. 1694 (1985).

The jury in this case viewed a videotape of the events leading to the traffic stop and the shooting. They heard White's testimony about his thoughts and impressions of the risks presented by McCloskey and Snyder. They were instructed as to the elements of felonious assault, but were told that the shooting could be justified if it was "objectively reasonable under the circumstances." They were instructed that when deciding whether White had reasonable

grounds to believe he or his partner were in imminent danger of death or great bodily harm, they should put themselves in White's position "with his characteristics and his knowledge or lack of knowledge, and under the circumstances and conditions that surrounded him at the time," and without "the 20/20 vision of hindsight." Those instructions appropriately guided the jury, and its factual findings should now be respected.

ARGUMENT

First Proposition of Law: R.C. 2941.145 is constitutional as applied to a law enforcement officer found guilty of committing an on-duty crime in which he used a firearm.

The firearm specification in R.C. 2941.145 does not provide any exemption for police officers found guilty of committing a crime while on duty. The general principles of statutory construction do not allow creation of an exception based on statutory intent, because resort to statutory construction is permissible only when the statute is ambiguous. "The first rule of statutory construction is that a statute which is clear is to be applied, not construed." *Vought Industries v. Tracy*, 72 Ohio St.3d 261, 265, 1995-Ohio-18, 648 N.E.2d 1364. *See also* R.C. 1.49 (permitting the court to examine statutory intent "if the statute is ambiguous"). Of course, had the General Assembly intended to exempt police officers from the specification, the legislature could have crafted an explicit exception. Ohio's legislature has provided such exemptions in other criminal statutes. *See, e.g.*, R.C. 2923.12(C)(1)(a); 2923.121(B)(1)(a); 2923.122(D)(1)(a); and 2923.17(C)(1). Michigan's legislature has similarly provided such an exemption in its firearm specification. *See* M.C.L.S. 750.227b(4).

But Ohio's General Assembly has not exempted police officers from R.C. 2941.145. Because the specification is unambiguous on its face, it must be applied as written, without

exception, unless its application is unconstitutional. Under the applicable test for due process violations, laws must be upheld "if they bear a real and substantial relation to the object sought to be obtained, namely, the health, safety, morals or general welfare of the public, and are not arbitrary, discriminatory, capricious or unreasonable." The federal test similarly looks for "a rational relationship between the statute and its purpose." *State v. Thompkins*, 75 Ohio St.3d 558, 560, 1996-Ohio-264, 664 N.E.2d 926. But "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998), quoting *Collins v. Harker Heights*, 503 U.S. 115, 129, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992). The intent of the due process clause is to prevent government officials "from abusing [their] power, or employing it as an instrument of oppression." That purpose is not frustrated by application of the specification to an individual convicted of a crime, regardless of whether the crime is committed on or off duty. *Id.*

Both White and the Sixth District reason that the statute was intended to discourage those in the "criminal world," rather than police officers, from using their firearms in criminal activity. But the argument proves too much. The analysis would, for example, permit defendants--even those who are not police or peace officers--to claim that the specification is inapplicable because they were authorized or required by their employer to carry a firearm, and they were not members of the "criminal world" to whom the statute applied. Even individuals with no duty or authority to carry a firearm in their employment might contend that they were not part of the "criminal world," because they previously had not committed crimes and had committed the charged offense without planning and in the heat of the moment while in lawful possession of a firearm.

Ohio courts have not previously reserved the firearm specification for such

circumstances, and the statute offers no language on which to base such a limitation. The statute provides the circumstances under which it is applicable, without consideration for whether the conviction is the defendant's first or fiftieth crime, or whether the defendant acted on impulse or with deliberation. What is required is a finding that "the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense." R.C. 2941.145(A).

The State acknowledges it is White's position that the jury in this case was improperly instructed so that the verdict cannot be relied upon as a true finding of criminality. Of course, the State does not agree that the jury was improperly instructed, but even an improperly instructed jury cannot render the firearm specification unconstitutional. Jury instructions can be corrected, but the constitutionality of a statute cannot be. If a properly instructed jury convicts an officer of an on-duty crime, the attachment of the specification to the crime is not the "egregious" conduct or "abuse of power" which represents a deprivation of due process.

White also contends that the "lynchpin of liability is unreasonable judgment, not criminal intent." (Brief of Appellant at p. 9.) But in this criminal case, the State had the burden of proving beyond reasonable doubt that White "knowingly" caused physical harm by means of a deadly weapon. The reasonableness of White's judgment related solely to his defense to the charge, just as any defendant might argue a theory of self defense premised upon a belief that he or she had an honest and reasonable belief of imminent danger. *See, e.g., State v. Thomas*, 77 Ohio St.3d 323, 330, 1997-Ohio-269, 673 N.E.2d 1339. Ohio recognizes that a defense may be rooted in reasonableness, and the fact that a jury rejects the defense does not mean that the jury

found the defendant had a lesser mens rea than required by the elements of the offense.

Finally, White attempts to distinguish previous cases involving penalties for law enforcement officers' use of firearms in the commission of crimes. According to White, those cases all involve "cover-ups and corruption." Certainly cover-ups may have followed the initial criminal acts, but the firearm penalty in each case was tied to commission of particular offenses of violence, not to offenses such as tampering, obstruction of justice, or falsification. *See, e.g., United States v. Ramos*, 537 F.3d 439 (5th Cir.2008), cert. denied, 556 U.S. 1127, 129 S.Ct. 1615, 173 L.Ed.2d 994 (2009).

White's amicus does not address the applicable constitutional test but rather labels the statute "unfair" and therefore unconstitutional. But a common notion of "fairness" would include non-discriminatory enforcement of statutes. *See, e.g., amicus' authority, In re D.B.*, 129 Ohio St.3d 104, 950 N.E.2d 528, 2011-Ohio-2671, ¶22 (holding that a statute is impermissibly vague if it "authorizes or even encourages arbitrary and discriminatory enforcement"). "Fairness" could also legitimately be said to require application of statutes as drafted, without carving special exceptions for individuals based on their occupations.

Despite viewing "fairness" as the test of constitutionality, White's amicus nevertheless criticizes the State for urging this court "to treat this case like any other criminal case." (Brief of Amicus at p. 6.) Treating the case "like any other criminal case" cannot truly be characterized as unfair, especially when Ohio's "settled public policy" actually holds police officers to a higher standard of conduct than the general public. *See Jones v. Franklin County Sheriff*, 52 Ohio St.3d 40, 43, 555 N.E.2d 940 (1990). Particularly in light of the higher standard of conduct imposed on police officers, applying the specification to an officer after a criminal conviction is not

egregious or an abuse of power. The Sixth District's decision holding the specification unconstitutional should therefore be reversed.

Second Proposition of Law: Ohio does not permit pre-trial dismissals of criminal charges based on civil immunity principles.

The State acknowledges that much of the Sixth District's majority opinion's discussion of immunity is dicta, and there is arguably some inconsistency in the opinion's text. However, there was an actual holding in the opinion, and that holding raises an issue for this court's resolution. *White* refused to adopt a theory of immunity when it was not raised in the trial court. That holding, coupled with the court's reversal of the judgment below and order of a new trial, may open the door to a claim of immunity in the trial court in either this case or in the pre-trial stages of future similar prosecutions. *White*'s willingness to raise such an issue is perhaps foreshadowed by his advocacy even in these proceedings of the two-step process once required in order to resolve government officials' qualified immunity claims. *See* Brief of Appellee at p. 18, citing, among other authorities, *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), overruled in relevant part by *Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808, 172 L.Ed.2d 565 (2008).

White began its analysis of the immunity issue by stating that a prerequisite of immunity is that the issue be raised initially in the trial court where it may be properly briefed and argued. *State v. White*, 6th Dist. No. L-10-1194, 2013-Ohio-51, ¶82. The opinion went on to observe that "the videotape in *White*'s cruiser, along with his testimony, would arguably suggest that whether *White*'s decision to shoot was objectively reasonable under *Garner* could be resolved as 'a pure question of law' at some pretrial stage." *White*, ¶84. The opinion then asserted that "the question

of an officer's possible entitlement to immunity in criminal cases, while complex, is not as farfetched as the state suggests." *White*, ¶85.

Ultimately, however, the Sixth District held that immunity could not be applied **when the issue was not raised in the trial court:**

So, while wise policy counsels the state never to say "never," White's attempt to merge his plea for immunity with an insufficiency review is, at day's end, unconvincing. And even accepting that no material facts have been left in doubt, *Scott, supra*, **the sheer complexity of an issue never raised below precludes our review here.**

White, ¶87 (emphasis added).

That holding, of course, opens the door to arguments that immunity may apply if the issue is properly raised in the trial court. Moreover, if the Sixth District's remand and order for new trial remain intact, the opinion may be used as the basis for an immunity claim in the trial court. Regardless of the trial court's ruling on the matter, a further appeal is likely. In the interest of judicial economy, the State seeks a declaration that regardless of whether the issue is raised below, Ohio recognizes no judicially created immunity that permits pre-trial dismissal of criminal charges against a police officer.

Third Proposition of Law: In a trial of a police officer charged with felonious assault for an on-duty shooting, the court commits neither an abuse of discretion nor plain error if it instructs the jury to determine, from the perspective of a reasonable police officer, whether the officer's use of deadly force was objectively reasonable, or whether the officer had reasonable grounds to believe that he or a fellow officer was in imminent danger of death or great bodily harm.

- A. **The instruction given was, according to the Sixth District, less rigorous than required in a deadly force case, but a defendant's conviction should not be reversed because the jury instructions were too favorable to him.**

White complains that the trial court's instructions were "imprecise and misleading." But

neither White nor his amicus addresses the fact that the Sixth District found error in the failure to give the *Garner* deadly force instruction because it imposes a "more stringent standard" than the non-deadly force standard. *White*, ¶107. *White* reasoned that "to give a non-deadly force instruction in a deadly force case is worse, for it could mislead the jury as to what *Garner* permits." Such a non-deadly force instruction in a deadly force case might permit the jury to "conclude, for example, that it was 'objectively reasonable' for the officer to shoot a suspect who posed no threat or who, in the 'escape' category, was fleeing the scene of a nonviolent misdemeanor or traffic offense rather than a violent felony." *White*, ¶108. Of course, that did not work to defendant's detriment. To the contrary, that possibility gave defendant the benefit of the doubt.

A conviction should not be reversed on the basis that jury instructions were too favorable to the defendant. Such instructions do not prejudice the defendant, and Ohio law is clear that reversal is not appropriate when a jury instruction is not prejudicial to a defendant. At worst, such an issue constitutes harmless error. *See* Crim.R. 52(A); *State v. Shane*, 63 Ohio St.3d 630, 631, 590 N.E.2d 272 (1992).

B. White did not request a deadly force instruction but requested an instruction that the jury weigh whether his use of force was "objectively reasonable under the circumstances."

White also complains that the jury instructions were "mostly from the State's proposal" and that "only one paragraph of the court's statement of law was proposed by the defense." (Brief of Appellee at p. 5.) That assertion is false.

WHITE'S REQUESTED INSTRUCTIONS (Filed May 10, 2010; citations to legal authorities omitted.)	INSTRUCTIONS GIVEN BY THE COURT (TT at pp. 1243-1246.)
<p>Even if not acting in self-defense, a police officer acting in pursuit of his official duties is justified in using such force, including deadly force, that is objectively reasonable under the circumstances. It is objectively reasonable under the circumstances if an officer has cause to believe that a person poses a threat of serious physical harm, either to the officer or to others.***</p>	<p>The defendant has asserted the affirmative defense that he was justified in his use of force in the exercise of his official duties as a police officer. *** In order to establish this defense, the defendant must prove by the preponderance of the evidence that he was acting in pursuit of his official duties and that his use of deadly force was objectively reasonable under the circumstances. *** If the defendant used more force than reasonably necessary in pursuing his official duties, the defense of justification is not available.</p>
<p>In deciding whether the Defendant had reasonable grounds to believe Officer Sargent or himself was in imminent danger of death or great bodily harm, you must put yourself in the position of the Defendant, with his characteristics and his knowledge or lack of knowledge, and under the circumstances and conditions that surrounded him at the time. You must consider the conduct of Michael McCloskey and decide whether his acts caused the Defendant reasonably and honestly to believe that Officer Sargent or himself was about to be killed or receive great bodily harm.***</p>	<p>In deciding whether the defendant had reasonable grounds to believe Officer Sargent or himself was in imminent danger of death or great bodily harm, you must put yourself in the position of the defendant, with his characteristics and his knowledge, and under the circumstances and conditions that surrounded him at the time. You must consider the conduct of Michael McCloskey and decide whether his acts caused the defendant reasonably and honestly to believe that Officer Sargent or himself was about to be killed or receive great bodily harm.</p>
<p>Reasonableness must be judged from the perspective of a reasonable police officer in light of all the facts and circumstances confronting the officer at the time in the moments before the use of deadly force rather than with the 20/20 vision of hindsight.***</p>	<p>Reasonableness must be judged from the perspective of a reasonable police officer in light of all the facts and circumstances confronting the officer at the time and in the moments before the use of deadly force rather than with 20/20 vision of hindsight.</p>

<p>What constitutes "reasonable" action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure. *** Allowance must be made for the fact that officers are often forced to make split-second judgements in circumstances that are tense, uncertain, and rapidly evolving. ***</p>	<p>What constitutes "reasonable" action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure. Allowance must be made for the fact that officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving. In determining whether the defendant acted reasonably in his use of force in the pursuit of his official duties, you must consider factors such as the severity of the crime Mr. McCloskey was a [sic] believed to have committed, whether Mr. McCloskey posed an immediate threat to the safety of defendant or another person, and whether Mr. McCloskey was actively resisting arrest or attempting to evade arrest by flight.</p>
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As the chart indicates, the instructions were largely based on the defendant's requested instructions. There were two variations. First, the court included the instruction that "if the defendant used more force than reasonably necessary in pursuing his official duties, the defense of justification is not available." The instruction was based on holdings in *Skinner v. Brooks*, 74 Ohio App. 288, 291-292, 58 N.E.2d 697 (1994); *State v. Foster*, 60 Ohio Misc. 46, 66, 396 N.E.2d 246 (Franklin C.P.Feb. 1, 1979); and *State v. Sells*, 30 Ohio Law Abs. 355 (2nd Dist.1939). The court reviewed those authorities, as well as standard OJI instructions on self defense, and defense counsel offered no contrary authority. (Tr. at pp. 1108-1111.) Given the authority to support the variation, and the absence of authority suggesting that the variation was improper, the trial court cannot be said to have abused its discretion in allowing the requested variation.

White's amicus argues that a deadly force case does not permit consideration of the fact

that less drastic means of force were available. In fact, the authority cited returns to reasonableness as the touchstone for the constitutionality of seizures, including those involving deadly force. *See Schulz v. Long*, 44 F.3d 643, 649 (8th Cir.1995). While the availability of alternative procedures does not itself render the use of deadly force unreasonable, the test ultimately is the reasonableness of the officer's perceptions and actions in light of those perceptions. Notably, one of the authorities relied upon by White's amicus advocates explicit consideration of necessity when considering the reasonableness of force. *See Rachel A. Harmon, When Is Police Violence Justified?* 102 Northwestern Univ. L.Rev. 1119, 1172 (2008).

The second variation from White's tendered instructions was to include all the reasonableness factors listed in *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). As noted above, the defense requested an instruction on determining reasonableness based on *Graham*. The State merely requested that the factors listed in *Graham* be presented in the instruction. The trial court observed that the tendered instruction was an "almost verbatim" quote from *Graham* and agreed to give the instruction. (TT at p. 1115.) Like the first variation from White's tendered instruction, the second variation indicates an effort by the trial court to ensure balanced and complete jury instructions, not the "arbitrary, unreasonable or unconscionable attitude" required to reverse for an abuse of discretion. *See State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

C. Constitutionality as a threshold inquiry has been abandoned by the United States Supreme Court.

White relies on *Saucier, supra*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272, for the proposition that in a criminal prosecution of a police shooting, the Fourth Amendment's

objective-reasonableness determination should be a threshold inquiry. The two-step inquiry is of limited value in this proceeding. *Saucier's* two-step inquiry was a determination incident to resolving government officials' qualified immunity claims, and like the Sixth District, White offers no support for extension of *Saucier* to criminal cases. But even in the civil context, the United States Supreme Court has held that *Saucier's* two-step process is no longer mandatory. *See Pearson, supra*, 555 U.S. 223, 129 S.Ct. 808, 172 L.Ed.2d 565 (2008).

Should this court choose to do so, clarification of the jury instruction to be given in criminal cases involving officers' use of deadly force is likely to be welcomed by prosecutors and courts alike. But importantly, even if this court chooses to clarify the instructions in some manner, the failure to give those precise instructions should not be held to be reversible error when a defendant asked for and received a less rigid standard. The trial court's instructions in this case cannot be said to reflect an "unreasonable, arbitrary or unconscionable" attitude, and therefore the instructions given should not be the basis of reversal. *See Adams, supra*, 62 Ohio St.2d at 157, 404 N.E.2d 144.

Fourth Proposition of Law: When a jury is instructed to apply the definition of "knowingly" set forth in R.C. 2901.22(B), the trial court does not commit plain error in failing to give a mistaken belief instruction.

Neither White nor his amicus nor the Sixth District has identified a point at which White requested a mistake instruction. Neither White nor his amicus nor the Sixth District addresses Ohio's case law that an instruction on "knowingly" as defined by R.C. 2901.22(B) encompasses a mistake instruction. And neither White nor his amicus nor the Sixth District addresses the fact that evidence was admitted and argument was made with respect to "reasonableness" that permitted the jury to find in favor of White even though McCloskey proved to be unarmed.

A. Ohio does not require a mistake instruction when the jury is instructed as to the statutory definition of "knowingly."

This court has refused to find error in the absence of an instruction on mistake when the jury was instructed as to the statutory definition of "knowingly." *State v. Wenger*, 58 Ohio St.2d 336, 390 N.E.2d 801 (1979), f.n. 3. Several courts, including the Sixth District, have held that a mistake-of-fact instruction was unnecessary when the general jury charge on the mens rea "fully embraced" the defense. See *State v. Griffin*, 6th Dist. No. L-11-1283, 2013-Ohio-411, ¶¶36-39; *State v. Rawson*, 7th Dist. No. 05-JE-2, 2006-Ohio-496, ¶¶13-15; and *State v. Harrison*, 12th Dist. No. CA87-11-151, 1988 Ohio App. LEXIS 2765.

White and his amicus do not consider this body of case law. Similarly, the Sixth District ignored *Wenger* and the other authorities.²

B. White was not prejudiced by the absence of the mistake instruction.

Because a mistake instruction was not requested, the absence of such an instruction is subject to plain error review, requiring an "obvious defect in a trial's proceedings" which "affected substantial rights" and which "affected the outcome of the trial." *State v. Steele*, Slip Opinion No. 2013-Ohio-2470, ¶30. Plain error is recognized "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Id.*

The United States Supreme Court has observed that when an instruction is not requested, the burden of proving prejudicial error is especially heavy, because "[a]n omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." *Henderson v. Kibbe*, 431 U.S. 145, 155, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977). And in this case,

²In fairness, *White* could not address the *Griffin* decision, which the Sixth District issued the month after it issued *White*.

there was ample testimony, argument, and instruction that McCloskey did not need to possess an actual gun in order for White's use of force to be "objectively reasonable." White's counsel called Officer James Scanlon as an expert witness at the trial of this matter, and Scanlon testified that an officer may reasonably shoot another, even when the other person later proves to be unarmed. In fact, Scanlon testified to his own experience of having shot someone who actually possessed only a toy gun:

Q. In your situations, would it matter that the person's armed or not?

A. No. It wouldn't have mattered. As a matter of fact, the one shooting I was involved in it happened with somebody that had a toy gun. It was a real threat to me. Was it real? In reality, after the fact, no. But again, by the standard we all live by and officers have been judged by for over 20 years, the facts known to the officer at the time that the shot is fired is all that matters.

(Tr. at p. 781.)

The theme continued in argument, when trial counsel for White argued that the reasonableness of White's conduct could not be judged with 20/20 hindsight:

He was shot, that is, Mr. McCloskey was shot because Officer White appropriately felt under all the circumstances that had occurred that evening that either his life or the life of Officer Sargent was threatened at that moment.

The hard part for you is--because we know that there was no gun on Mr. McCloskey at that time, is not to judge the case with 20/20 hindsight. And the judge will tell you, you cannot do that. You must judge it under the quickly evolving circumstances that Officer White understood when he exited the vehicle after the entire event took place, after he had his service revolver out and after he gave an instruction to Mr. McCloskey and Mr. McCloskey turned a second time targeting him.

And as everybody testified, all the experts testified there doesn't have to be any crime. The officer just has to fear for his life. It doesn't matter if it's a minor misdemeanor or the most severe felony. It's not required. There doesn't have to be a weapon of any kind if the officer reasonably believed under all the circumstances that either his life or that of another was in danger.

(Tr. at p. 1163, 1165.)

Of course, the trial court instructed the jurors that the case could not be judged with the 20/20 vision of hindsight but rather from the perspective of a reasonable police officer "in light of all the facts and circumstances confronting the officer at the time and in the moments before the use of deadly force." Additionally, McCloskey's conduct was to be evaluated to determine "whether his acts caused the defendant reasonably and honestly to believe that Officer Sargent or himself was about to be killed or receive great bodily harm." Those instructions were sufficient to allow the argument that the "mistake" was reasonable. *See also State v. Dunivant*, 5th Dist. No. 2003-CA-00175, 2005-Ohio-1497, ¶¶23-27; and *State v. Evans*, 8th Dist. No. 79895, 2002-Ohio-2610, ¶53.

White summarily rejected the rationale of *Dunivant* and *Evans*, stating merely that the issue of whether a "mistake was reasonable or unreasonable is too important to be palmed off as an inferential matter." *White*, f.n. 24. However, the question of reasonableness was not "palmed off" by the trial court. The issue of determining the reasonableness of an officer's belief was specifically addressed in the evidence, in trial counsel's argument, and in the jury instructions. The instructions on determining the reasonableness of White's perceptions and judgments were drawn almost entirely from White's proposed instruction, with the addition of specific factors that the jury could use in determining whether those perceptions were reasonable.

The absence of a particular mistake or mistaken belief instruction was neither requested nor required under Ohio law, and the trial court cannot be said to have committed plain error in failing to provide the instruction. In any event, the absence of the instruction did not prejudice White, because the jury instructions provided detailed criteria and instructions for assessing the reasonableness of White's belief that harm was imminent. The Sixth District's decision should

therefore be reversed.

Fifth Proposition of Law: In a trial of a police officer charged with felonious assault, exclusion of testimony regarding the precise violation and degree of offense a suspect is believed to have committed is not an abuse of discretion.

White's own brief acknowledges that he was permitted to testify as to 57 separate facts related to his subjective state of mind, including his impressions and his perceptions of McCloskey's movements. (Brief of Appellant at pp. 2-5.) Moreover, the trial court specifically instructed the jury that "you may still consider defendant's testimony as to events, actions and appearances that he observed before the use of force, as well as to his conclusions based on those observations that Mr. McCloskey was intoxicated or armed with a weapon." (Tr. at 1245.)

Despite being permitted to testify as to 57 separate observations, thoughts, or impressions, White complains of only one specific limitation on his testimony--the question of the specific offense and felony level of the charge he envisioned against McCloskey. (Brief of Appellee at p. 5.) However, White was permitted to testify that he believed that McCloskey intended to flee, and he was permitted to demonstrate each and every moving violation that he believed McCloskey committed. The trial court's limitation on his testimony was appropriate in light of the uncontradicted video recording of events leading up to the shooting.

Permitting White to testify that he intended to charge felony fleeing would have allowed him to testify, in effect, that (1) "the offender was fleeing immediately after the commission of a felony;" or (2) "operation of the motor vehicle by the offender was a proximate cause of serious physical harm to persons or property;" or (3) "operation of the motor vehicle by the offender caused a substantial risk of serious physical harm to persons or property." The videotape, even when coupled with White's testimony, does not support such testimony. There was simply no

evidence at trial that McCloskey was fleeing after committing a felony. There was likewise no evidence that his operation of the motorcycle had proximately caused a serious physical harm to persons or property.

Finally, White did not identify in his testimony any substantial risk of serious physical harm to persons or property. White admitted he began following the motorcycles because impaired drivers are common in the late night and early morning hours, not because White saw a serious risk of harm. And White followed the motorcycles through three intersections before activating his lights. In fact, that segment of the video recording lasted from 2:12.48 to 2:16.34, almost four full minutes, during which White apparently saw no violation sufficient to signal the bikes to stop.

After White activated his lights and sirens, the motorcycles traveled 16 seconds, covering 550 or 600 feet at an average speed of 38 or 39 miles per hour. The area was not congested with traffic, and there were no pedestrians on the street, so no one was forced to engage in evasive maneuvers to avoid collisions or other harm. The length of the "pursuit" following activation of the signals was not unusually long. Two officers testified at trial that motorists often do not stop immediately after signals are activated simply because of lack of awareness that the signal has been given. (TT at pp. 379-380, 443-446.)

Snyder, not McCloskey, made greater deviations from his lane of travel and ultimately lost control of his bike at the sight of a police car heading down the wrong lane of travel on an intersecting road. Snyder was charged with misdemeanor fleeing, as opposed to the felony fleeing charge which White said he planned to charge.

Given the evidence at trial, a limit on the testimony regarding anticipated charges was

reasonable. There was no foundation for the testimony that a felony fleeing charge was appropriate, and requiring an evidentiary foundation for such testimony is, of course, appropriate. Presumably the trial court would not have permitted White to testify that he intended to arrest McCloskey for murder or kidnaping, because the evidence would not have supported those charges. The evidence likewise did not support the conclusion that McCloskey was fleeing after committing a felony or that he operated his motorcycle causing serious physical harm or a substantial risk of serious physical harm to persons or property.

White contends that "only Officer White's perceptions are relevant to the objective-reasonableness inquiry," and that the trial court erred by failing to give an instruction limiting testimony by the victim and his companion as to their thoughts and activities in the moments leading up to the shooting. (Brief of Appellee at p. 16.) White's contention that only his own perceptions are relevant is incorrect. The standard is objective reasonableness, requiring an analysis of "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham, supra*, 490 U.S. at 397, 109 S.Ct. 1865, 104 L.Ed.2d 443. As to McCloskey and Snyder's testimony, no objection was made and no limiting instruction was ever requested. The trial court can hardly be faulted for failing to give a limiting instruction when one was never requested.

CONCLUSION

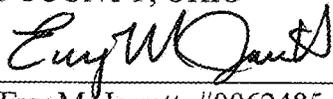
The jury in this case heard evidence related to officers' shootings based on mistaken belief. Defense counsel clearly argued that no weapon need to have been found on McCloskey in order for the jury to find that the shooting was reasonable. The jury was instructed not to view

White's actions from his position "with his characteristics and his knowledge or lack of knowledge, and under the circumstances and conditions that surrounded him at the time," without "the 20/20 vision of hindsight."

Those instructions properly guided the jury's deliberations and consideration of the video recording, White's own testimony, and the testimony of his expert witnesses. The results of the jury's deliberations should be respected, and the Sixth District's decision in this case should be reversed.

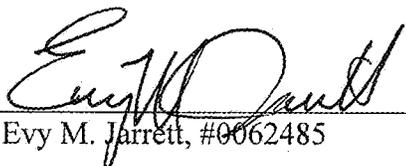
Respectfully submitted,

JULIA R. BATES, PROSECUTING ATTORNEY
LUCAS COUNTY, OHIO

By: 
Evy M. Jarrett, #0062485
Assistant Prosecuting Attorney

CERTIFICATION

I certify that a copy of the foregoing was sent via ordinary U.S. Mail this 21st day of October, 2013, to Peter Galyardt, Assistant State Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215; Larry H. James, Christina L. Corl, and Daniel J. Hurley, Crabbe, Brown & James, LLP, 500 South Front Street, Suite 1200, Columbus, Ohio 43215 and Paul L. Cox, 222 East Town Street, Columbus, Ohio 43215; and Matthew A. Kern, 72 Public Square, Medina, Ohio 44256.


Evy M. Jarrett, #0062485