[Cite as *State v. McGee*, 2009-Ohio-6397.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 07 MA 137
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
GREGORY McGEE	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of Common Pleas of Mahoning County, Ohio
Case No. 06 CR 939

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

Atty. Paul J. Gains
Mahoning County Prosecutor
Atty. Ralph M. Rivera
Assistant Prosecuting Attorney
21 West Boardman Street, 6th Floor
Youngstown, Ohio 44503

For Defendant-Appellant:

Atty. Dennis Day Lager
1025 Chapel Ridge Street, N.E.
Canton, Ohio 44714

JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Joseph J. Vukovich

Dated: December 4, 2009

[Cite as *State v. McGee*, 2009-Ohio-6397.]
WAITE, J.

{¶1} Appellant, Gregory McGee, appeals his jury convictions on one count of murder, in violation of R.C. 2903.02(A)(D), a felony of the first degree, with a firearm specification, in violation of R.C. 2941.145(A), and one count of having weapons under a disability, a violation of R.C. 2923.12(A)(3)(B), a felony of the third degree.

{¶2} Appellant contends that he was denied effective assistance of counsel and that the trial court committed reversible error based on its jury instructions regarding self-defense. Appellant cannot demonstrate that he would have been acquitted but for his counsel's conduct at trial. He also cannot show that the trial court's jury charge on self-defense was erroneous. Therefore, Appellant's assignments of error are overruled and his conviction is affirmed.

{¶3} The following facts are taken from Appellant's testimony at trial. On August 25, 2006, Damian Hill drove Appellant to a two-story duplex at 30 Saranac Avenue in Youngstown, Ohio to purchase crack cocaine from his drug supplier of approximately two months, Reesie Phillips. (Tr., pp. 877-878.) Appellant acknowledged at trial that he both used and sold crack cocaine. (Tr., p. 904.) As he was approaching the house, he was met by the decedent, Charles Bush, who was leaving the porch of Phillips' neighbor, Martina Moore. (Tr., p. 881.)

{¶4} Appellant testified that Bush was Phillips' "doorman." (Tr., p. 888.) According to Appellant, Phillips had a prosthetic leg, and he relied upon Bush for security. Appellant and Bush entered the second story apartment at 30 Saranac Avenue, and walked through the living room into the dining room. (Tr., p. 882.)

{¶5} Bush informed Appellant that Phillips had been arrested the previous day, so Appellant told Bush that he would come back in the next few days. (Tr., p. 883.) Bush told Appellant that he had crack cocaine, but Appellant stated that he was "all right." (Tr., p. 884.) According to Appellant, he was reluctant to buy drugs from anyone but Phillips. At that point, Bush drew a gun from his waistband and said to Appellant, "[y]our money ain't good enough to spend with me?" (Tr., p. 884.) Appellant lunged for the gun, and while the two men struggled, Bush told Appellant, "[y]ou're fucked up now. I'm gonna kill you." (Tr., p. 885.)

{¶6} Appellant was able to disarm Bush during the scuffle, but Bush continued to threaten to kill him. (Tr., p. 886.) With the gun in his hand, Appellant turned to flee the residence, but remembered he had seen another gun on the dining room table when he arrived. (Tr., p. 886.) Furthermore, he was not certain that Bush did not have another gun on his person. (Tr., p. 914.) Appellant, who was facing the door, heard Bush say, "I'm about to kill you, bitch," so he "swung the gun behind [him] while [he was] still running and let off shots trying to make for the door." (Tr., p. 886.) Appellant fired seven shots, but claimed that he was not aware that any actually hit Bush. He got into Hill's car and eventually threw the gun out of the car window. (Tr., p. 889.)

{¶7} When police were dispatched to 30 Saranac Avenue, Bush identified "Greg McGee" as the man who shot him. According to Bush's mother, he was carrying $1,800.00 that day that was not recovered at the crime scene. (Tr., p. 414.)

{¶8} A few days after the shooting, two of Phillips' neighbors indentified Appellant through a photo array as the man who entered 30 Saranac Avenue and then hastily exited the residence after gunshots rang out.

{¶9} Appellant was arrested but denied that he was at the scene of the crime or that he had ever exchanged words with Bush. (Tr., p. 933.) After he was aware of Bush's accusation, Appellant wrote to the trial judge asking for a bail reduction. In the letter dated October 7, 2006, he again denied committing the crime, and suggested instead that it was another "Greg McGee." (Tr., pp. 896-897, 936.)

{¶10} When Appellant was asked why he never told the police or the prosecutor's office that he was acting in self-defense, he responded that he was scared and did not think that anyone would believe him. (Tr., pp. 893-894, 899.) Appellant's trial counsel was his third attorney of record, and was retained shortly before trial. Appellant indicated that he had difficulty working with his first two attorneys, and that he was confident that his first two attorneys would not have believed his story. (Tr., p. 899.)

FIRST ASSIGNMENT OF ERROR

{¶11} "DEFENDANT-APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY ARTICLE I, § 10 OF THE CONSTITUTION OF THE STATE OF OHIO AND BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES BY REASON OF COUNSEL'S CUMULATIVE FAILURES TO ADVOCATE DEFENDANT-APPELLANT'S CAUSE AND TO BRING TO BEAR SUCH SKILL AND

KNOWLEDGE AS WOULD RENDER CONFIDENCE IN THE FAIRNESS OF DEFENDANT-APPELLANTS [SIC] TRIAL AND ITS RESULTING VERDICT"

{¶12} We review a claim of ineffective assistance of counsel under the two-part test articulated in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Under *Strickland*, a reviewing court will not deem counsel's performance ineffective unless a defendant can show his lawyer's performance fell below an objective standard of reasonable representation and that prejudice arose from the lawyer's deficient performance. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph one of syllabus.

{¶13} To show prejudice, a defendant must prove that, but for his lawyer's errors, a reasonable probability exists that the result of the proceedings would have been different. Id. at paragraph two of syllabus. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland* at 694. Prejudice may not be assumed, it must be affirmatively shown. See *State v. Reine*, 4th Dist. No. 06CA3102, 2007-Ohio-7221, at ¶41.

{¶14} When considering an ineffective assistance of counsel claim, the reviewing court should not consider what, in hindsight, may have been a more appropriate course of defense. See *State v. Phillips* (1995), 74 Ohio St.3d 72, 85, 656 N.E.2d 643 (a reviewing court must assess the reasonableness of the defense counsel's decisions at the time they are made). Rather, the reviewing court "must be highly deferential." *Strickland*, 466 U.S. at 689.

{¶15} Appellate courts, "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " Id.; see, also, *State v. Hamblin* (1988), 37 Ohio St.3d 153, 524 N.E.2d 476, certiorari denied (1988), 488 U.S. 975, 109 S.Ct. 515, 102 L.Ed.2d 550.

Ineffective Claim No. 1

{¶16} "Defense counsel failed to file appropriate pre-trial motions to suppress in-court identification of Defendant-Appellant as the perpetrator of the shooting based upon an impermissibly suggestive photo array line-up provided to identification witnesses prior to trial."

{¶17} Trial counsel's failure to file a motion to suppress does not necessarily constitute ineffective assistance of counsel. *State v. Madrigal* (2000), 87 Ohio St.3d 378, 389, 721 N.E.2d 52. However, the failure to file a motion to suppress may constitute ineffective assistance of counsel when the record demonstrates that the motion would have been granted. *State v. Barnett*, 7th Dist. No. 06-JE-23, 2008-Ohio-1546, ¶31.

{¶18} Convictions based on eyewitness identifications at trial following pretrial identification by photograph will be set aside only if the photographic identification procedure was so impermissibly suggestive so as to give rise to a very substantial likelihood of irreparable misidentification. *State v. Perryman* (1976), 49 Ohio St.2d

14, 22, vacated in part on other grounds subnom, *Perryman v. Ohio* (1978), 438 U.S. 911, citing *Simmons v. United States* (1968), 390 U.S. 377, 384.

{¶19} However, even if the procedure was unnecessarily suggestive, the identification need not be suppressed if it is reliable under the totality of the circumstances. *State v. Waddy* (1992), 63 Ohio St.3d 424, 438, citing *Neil v. Biggers* (1972), 409 U.S. 188, 199. Factors determining the degree of reliability include:

{¶20} "[T]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." Id. at 199-200.

{¶21} After providing videotaped witness statements to the police a few days after the murder, Deborah and William Tondo, a married couple who lived next door to the house where the crime was committed, identified Appellant through a photo array as the man who shot Bush. While no two persons in the array were dressed in similar colors or in any similar fashion, Appellant was the only individual in the photo array wearing a red shirt. When asked to identify the perpetrator from the same photo array at trial, Mr. Tondo responded that Appellant was in the "corner picture" stating "[h]e's got on a red shirt * * * Now that's what he had on the day he shot him too, the red shirt." (Tr., p. 576.)

{¶22} Appellant argues, "[n]oticeable about William Tondo's response is that it was inappropriate to the question, namely, that it goes to the identity of [Appellant] and not to a description of the exhibit, and that it demonstrates Tondo's fixation on

the red shirt, specifically identifying it as the shirt the perpetrator was wearing at the time of the shooting." (Appellant's Brf., p. 13.)

{¶23} First, there is no evidence on the record that the police were aware that Appellant was wearing a red shirt when he committed the crime. The record reveals that the Tondos were interviewed by the police a few days after the murder and were given the photo array after they completed their statements. The fact that Appellant might be wearing the same red shirt appears to be a coincidence, rather than a ploy by the police to make Appellant's photo stand out among the other photos.

{¶24} Second, even if the red shirt was impermissibly suggestive, the Tondos' testimony at trial demonstrated that they had ample opportunity to view and identify Appellant as the man who shot Bush. According to Mr. Tondo's testimony, he was sitting on his porch when he saw a car pull up and park across the street. (Tr., p. 565.) Initially, he did not pay attention to the man who exited the passenger side of the car, because there was a lot of traffic, that is, people in and out of their cars, on Saranac Avenue. (Tr., pp. 566, 580.) However, he did notice the driver of the car, because he believed that the driver was trying to hide his identity by remaining in the shadows of the car. (Tr., p. 567.) Mr. Tondo first took notice of Appellant when he and Bush held a conversation on the sidewalk leading to the porch at 30 Saranac Avenue. (Tr., p. 582.)

{¶25} According to Mr. Tondo, Appellant and Bush went into the dwelling at 30 Saranac and shortly thereafter he heard four gunshots. (Tr., pp. 584-586.) Then, Appellant, slouched over and holding a gun at his waist, ran out of the building. (Tr.,

p. 568.) He ran toward the car across the street, which Hill had put into gear and which was coasting down the street, and jumped into the moving automobile.

{¶26} Mrs. Tondo testified that she and her husband were sitting on the front porch when Appellant exited a car parked across the street. (Tr., p. 463.) She testified that she glanced at him long enough to be able to identify him. (Tr., p. 464.) She testified that she heard gunshots and then she saw Appellant "[m]oving quickly" toward the car. (Tr., pp. 467-468.) According to Mrs. Tondo, there was nothing obstructing her view of Appellant when he was walking into and out of the house at 30 Saranac Avenue. (Tr., pp. 468-469.)

{¶27} Therefore, the Tondos had ample opportunity to view Appellant both prior to and after the crime. No due process violation occurred because the Tondos' identification of Appellant did not stem from the photo array, but, instead, from their observations at the time of the crime. *State v. Davis* (1996), 76 Ohio St.3d 107, 666 N.E.2d 1099.

{¶28} Thus, Appellant cannot demonstrate that a motion to suppress the Tondos' testimony would have had a reasonable probability of success. His first ineffective assistance of counsel claim is overruled. As his second and third claims both involve the admission of statements made by Bush prior to his death, we will address them together.

Ineffective Claim No. 2

{¶29} "Defense counsel failed to properly prepare for a motion *in limine* hearing to suppress evidence styled as a 'dying declaration' of decedent, Charles

Bush, by failing to subpoena witnesses that would have impeached testimony of the State's lone witness that the statements of Charles Bush prior to death constituted a 'dying declaration;' and failed to proffer videotape witness statements for review."

Ineffective Claim No. 3

{¶30} "Defense counsel failed to renew his objection at trial as to the admission of Charles Bush's statements as a dying declaration, all for the purpose of preserving for appeal the trial court's ruling on the motion *in limine*, thereby waiving appellate review on that issue."

{¶31} Evid.R. 804(B)(2) defines a dying declaration, or a statement under belief of impending death, as, "a statement made by a declarant, while believing that his or her death was imminent, concerning the cause or circumstances of what the declarant believed to be his or her impending death."

{¶32} We summarized the law on the "dying declaration" exception to hearsay in *State v. Ross*, 7th Dist. Nos. 96 C.A. 247, 96 C.A. 251 as follows:

{¶33} "In order for statements of a deceased to be admissible as dying declarations, '[i]t is essential * * * that it should be made to appear to the court, by preliminary evidence, not only that they were made *in articulo mortis* [at the point of death], but also made *under a sense of impending death*, which excluded from the mind of the dying person all hope or expectation of recovery.' * * * *Robbins v. State* (1857), 8 Ohio St. 131. The state of mind of the declarant at the time of his declarations is decisive. *State v. Woods* (1972), 47 Ohio App.2d 144, 147, 352 N.E.2d 598. 'Despair of recovery may * * * be gathered from the circumstances if the

facts support the inference.' *State v. Kotowicz* (1937), 55 Ohio App. 497, 501, 9 N.E.2d 1003, quoting *Shepard v. United States* (1933), 290 U.S. 96, 100, 54 S.Ct. 22, 78 L.Ed. 196." (Emphasis in original.) Id. at *4.

{¶34} At a motions hearing on May 3, 2007, the trial court received the testimony of Detective Douglas Bobovnyik for the purpose of ruling on Appellant's motion in limine to exclude Bush's alleged "dying declaration." According to his testimony, he responded to a call on the police radio involving a shooting at 30 Saranac on August 25, 2006. (Hrg. Tr., p. 5.) When he arrived, he was informed by a small group of people standing in front of the duplex that the victim was inside the house. (Hrg. Tr., p. 6.) He found Bush lying on his back in the living room. He was the first officer on the scene.

{¶35} According to Bobovnyik, there was one woman and two or three men in the room with Bush, including Mr. Tondo. (Hrg. Tr., p. 7.) Bush appeared to be shot in the chest just below the armpit on his left side. (Hrg. Tr., p. 10.) There was no bleeding outside of his body, but he was struggling to breathe. Based upon the location of the bullet wound, Bobovnyik believed that Bush was going to die. (Hrg. Tr., p. 11.)

{¶36} Bobovnyik testified that he told Bush that he was shot in the side and "[t]hat's real serious." (Hrg. Tr., p. 11.) He told Bush that he may not recover from his wounds, and Bush acknowledged that he was hurt "real bad" and that he might die. (Hrg. Tr., p. 11.) Bush identified "Greg McGee" as the man who shot him. (Hrg. Tr., p. 11.)

{¶37} In his brief, Appellant argues that his trial counsel failed to subpoena Mr. Tondo and Martina Moore. He contends that neither of them say that they heard Bush acknowledge that he was dying in their videotaped witness statements. Appellant's trial counsel attempted to subpoena Moore, but the address provided in discovery was not her current address. Appellant's trial counsel asked for an extension of time to subpoena Moore at her work address, but the trial court refused. In the alternative, Appellant's trial counsel asked the trial court to consider their videotaped statements at the hearing, but the trial court refused. Appellant's trial counsel did not proffer the videotaped statements and, therefore, they are not a part of the record on appeal. Based upon his trial counsel's failure to subpoena the witnesses, to proffer their statements, or to renew his objection to Bobovnyik's testimony regarding Bush's statements at trial, Appellant contends that his trial counsel provided ineffective assistance of counsel.

{¶38} While it is true that the videotaped statements are not a part of the record on appeal, Appellant's assertion that neither Tondo nor Moore heard Bush acknowledge his dire medical condition was confirmed by their testimony at trial. Moore testified that Bobovnyik told Bush that, "it doesn't look good and he may not make it," but that Bush did not respond to Bobovnyik's statements. (Tr., pp. 617, 622.) Tondo testified that Bobovnyik's conversation with Bush consisted of little more than the acknowledgement that "Greg McGee" was the man who shot him. (Tr., p. 573.)

{¶39} Although the testimony of Tondo and Moore directly contradicted Bobovnyik's testimony regarding Bush's acknowledgement of his medical condition, we cannot conclude that trial counsel's failure to subpoena them for the hearing was prejudicial. Even assuming that the trial court would have refused to admit Bush's statement as a dying declaration, the statement could have been admitted as an excited utterance.

{¶40} The excited utterance exception allows testimony on, "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Evid.R. 803(2). To be admissible under Evid.R. 803(2), a statement must concern an occurrence observed by the declarant that was startling enough to produce a nervous excitement in the declarant and must be made before there was time for such excitement to lose domination over his or her reflective faculties. *State v. Huertas* (1990), 51 Ohio St.3d 22, 31, 553 N.E.2d 1058 (statement made 45 minutes after an event but while the declarant was still agitated and in serious pain to be excited utterance).

{¶41} Appellant contends that, even if Bush's statement is admissible as an excited utterance, he was prejudiced by the characterization of the statement by the state at trial as a "dying declaration." The jurors were not instructed as to the meaning of the term of art, "dying declaration," and, as a consequence, the term had no legal significance to the jurors. This record reflects that the characterization of Bush's statement at trial had no outcome-determinative effect. Accordingly, his second and third ineffective assistance of counsel claims are overruled.

Ineffective Claim No. 4

{¶42} "Defense counsel failed to advocate on behalf of Defendant-Appellant by failing and refusing to motion the court for severance of the Weapons Under Disability charge from the charge of Murder with a Firearm Specification, thereby allowing the State to place Defendant-Appellant's character in issue during its case-in-chief through the use of Defendant-Appellant's prior felony convictions for the offenses of drug possession, having weapons under a disability and improper handling of a firearm, all of which prejudiced and pre-disposed the trier of fact."

{¶43} Whether a defendant shall be tried separately on different counts of an indictment is a matter within the trial court's discretion. *State v. Strobel* (1988), 51 Ohio App.3d 31, 32, 554 N.E.2d 916; *Braxton v. Maxwell* (1965), 1 Ohio St.2d 134, 135, 205 N.E.2d 397. However, in this case, Appellant's trial counsel did not move for severance.

{¶44} Because R.C. 2923.12 does not restrict the right of a defendant under a disability to act in self-defense, the state contends that the decision by Appellant's trial counsel to forego the motion for severance was a trial tactic. See *State v. Hardy* (1978), 60 Ohio App.2d 325, 397 N.E.2d 773, paragraph two of the syllabus. The state asserts that, "defense counsel thought he could try both counts together and clear the board with one self defense instruction, rather than risking a potential acquittal and conviction." (Appellee's Brf., p. 11.) The state also argues that, because Appellant took the stand, his criminal history was admissible at trial with or without the weapons while under disability charge.

{¶45} Crim.R. 8(A) provides that two or more offenses may be charged in the same indictment if the offenses are (1) of the same or similar character, or (2) are based on the same act or transaction, or (3) are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or (4) are part of a course of criminal conduct. Crim.R. 14 provides that if it appears that a defendant is prejudiced by a joinder of offenses in an indictment for trial, the court shall order an election or separate trial of counts or provide such other relief as justice requires.

{¶46} "When a defendant claims that he was prejudiced by the joinder of multiple offenses, a court must determine (1) whether evidence of the other crimes would be admissible even if the counts were severed, and (2) if not, whether the evidence of each crime is simple and distinct." *State v. Schaim* (1992), 65 Ohio St.3d 51, 59, 600 N.E.2d 661.

{¶47} The state correctly argues that Appellant was not prejudiced by his counsel's failure to file a motion to sever the R.C. 2923.13 charge. Pursuant to Evid.R. 609(A)(1), prior convictions are admissible for the purpose of attacking a witness' credibility. Because Appellant took the stand in his own defense, he cannot demonstrate prejudice based upon his trial counsel's failure to move to sever the weapon while under a disability charge. Accordingly, his fourth ineffective assistance of counsel claim is overruled.

{¶48} Two of Appellant's ineffective assistance of counsel claims and his second assignment of error are based upon several statements made by the state

and a portion of the jury charge explaining the state's burden of proof on the elements of the crime when a defendant asserts self-defense. As these claims are interrelated, we address them together.

Ineffective Claim No. 5

{¶49} "Defense counsel failed to object to repetitive mis-statements of law by the prosecutor during voir dire of the jury, testimony of witnesses during trial and final argument, all of which communicated to the jury a shifting burden of proof from the State to the Defendant, and which effectively denied the defense of self-defense."

Ineffective Claim No. 7

{¶50} "Defense counsel failed to object to improper jury instructions of the trial judge which improperly stated the law of self-defense and which shifted the burden of proof from the State of Ohio to Defendant-Appellant, all of which constituted structural error in the trial proceedings, thus depriving Defendant-Appellant of his due process right to a fair trial."

SECOND ASSIGNMENT OF ERROR

{¶51} "THE TRIAL COURT COMMITTED PREJUDICIAL AND REVERSIBLE ERROR BY IMPROPERLY INSTRUCTING THE JURY ON THE LAW OF SELF-DEFENSE, WHICH THEREBY SHIFTED THE BURDEN OF PROOF FROM THE STATE OF OHIO TO DEFENDANT-APPELLANT, ALL OF WHICH CONSTITUTED STRUCTURAL ERROR IN THE TRIAL PROCEEDINGS, THUS DEPRIVING DEFENDANT-APPELLANT OF HIS RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW."

{¶52} To establish a claim of self defense, a defendant must prove the following elements: "(1) that the defendant was not at fault in creating the situation giving rise to the affray; (2) that 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 from such danger was in the use of such force; and (3) that the defendant did not violate any duty to retreat or avoid the danger." *State v. Barnes* (2002), 94 Ohio St.3d 21, 24, 759 N.E.2d 1240.

{¶53} The Supreme Court of Ohio elaborated on the nature of the defense of self-defense in *State v. Martin* (1986), 21 Ohio St.3d 91, 488 N.E.2d 166, explaining:

{¶54} "This court, in *State v. Poole* (1973), 33 Ohio St.2d 18, 19, [62 O.O.2d 340], characterized the defense of self-defense as a 'justification for admitted conduct.' Self-defense represents more than a 'denial or contradiction of evidence which the prosecution has offered as proof of an essential element of the crime charged * * *.' *Id*. Rather, we stated in *Poole*, this defense admits the facts claimed by the prosecution and then relies on independent facts or circumstances which the defendant claims exempt him from liability. *Id*. Thus, the burden of proving self-defense by a preponderance of the evidence does not require the defendant to prove his innocence by disproving an element of the offense with which he is charged. The elements of the crime and the existence of self-defense are separate issues. Self-defense seeks to relieve the defendant from culpability rather than to negate an element of the offense charged." (Emphasis in original.) Id. at 94, 488 N.E.2d 166.

{¶55} In other words, the state always has the burden of proof in a criminal trial to prove the elements of the crime charged beyond a reasonable doubt. When a defendant asserts "self-defense," he or she must prove by a preponderance of the evidence the elements of self defense. However, when a defendant asserts self-defense, this does not relieve the state of its burden to prove each and every one of the essential elements of the underlying crime. *State v. Sankey*, 5th Dist. No. 2005-CA-00272, 2006-Ohio-5316, ¶36.

{¶56} The state, on numerous occasions throughout the trial, asserted without objection that the defense of self-defense constituted an admission of the essential elements of the crimes. Appellant contends that those statements relieved the state of its burden to prove the elements at trial. The prosecutor, on behalf of the state, made the following statements at trial:

{¶57} During voir dire:

{¶58} "[B]efore the Defendant can claim self-defense, he must admit -- admit that he committed the crimes he's charged with. Are you okay with that?" (Tr., p. 210.)

{¶59} "So the Defendant in this case would have to admit that he committed the murder before he can say self-defense. Okay?" (Tr., p. 211.)

{¶60} "If someone admits to doing something, is that pretty good evidence of -- that goes towards guilty beyond a reasonable doubt?" (Tr., p. 303.)

{¶61} During cross-examination of Appellant:

{¶62} "You understand you to have [sic] admit to the murder -- right? -- before you're afforded the right to self-defense. You to have [sic] admit to the crimes." (Tr., p. 964.)

{¶63} During closing argument:

{¶64} "So before you can even consider self-defense, ladies and gentlemen, he is guilty. He is guilty of murder before you even start thinking about self defense." (Tr., 1035.)

{¶65} "He admits to the murder. It is then his job to prove self-defense. That's the law. The Judge is going to give you the law. That's the law." (Tr., p. 1036.)

{¶66} It appears from the record that none of these statements by the prosecutor were entirely accurate. While Appellant may admit to the actions that occurred when he claims self-defense, he does not admit to intent, an essential element of the crime of murder. These statements are clearly improper.

{¶67} The trial court, however, in its instructions, stated that "[a] Defendant is presumed innocent unless guilt is established beyond a reasonable doubt. A Defendant must be acquitted of the charge unless the State produces evidence which convinces you beyond a reasonable doubt of each and every element of the offense and specification charged in the indictment." (Tr., p. 1044.)

{¶68} The trial court provided the standard jury instructions on murder, as well as the lesser included offenses of voluntary manslaughter and reckless homicide. At the conclusion of the description of the elements of each crime, the trial court stated,

"[i]f you find that the State proved beyond a reasonable doubt all the essential elements of the crime of [ ] of Charles Bush, your verdict must be guilty of [ ] as charged. If you find that the State failed to prove any one of the essential elements of the offense of [ ] of Charles Bush, then you must find the Defendant not guilty." (Tr., pp. 1054-1055.) These instructions are completely accurate.

{¶69} The trial court then provided the following instruction on self-defense:

{¶70} "A Defendant has asserted an affirmative defense known as self-defense. Self-defense is a justification for admitted conduct. The Defendant admits to the facts claimed by the prosecution, but offers independent evidence of self defense. * * * If the. [sic] Defendant proved every element of self defense by a preponderance of the evidence, then he must be found not guilty. If the Defendant failed to prove every element of self defense by a preponderance of the evidence, then he must be found guilty." (Tr., pp. 1059-1061.)

{¶71} Appellant challenges this jury instruction on self-defense as prejudicial error, and also relies on the failure to object to the jury instruction by Appellant's trial counsel as proof of ineffective assistance of counsel. However, there is no defect in the trial court's instruction on self-defense.

{¶72} A trial court must fully and completely give all jury instructions that are relevant and necessary for the jury to weigh the evidence and to discharge its duty as the factfinder. *State v. Comen* (1990), 50 Ohio St.3d 206, 553 N.E.2d 640, paragraph two of the syllabus. In examining the trial court's jury instructions we must review the court's charge as a whole, not in isolation, in determining whether the jury

was properly instructed. *State v. Burchfield* (1993), 66 Ohio St.3d 261, 262, 611 N.E.2d 819.

{¶73} As stated previously, Appellant contends that the jury instructions shifted the burden of proof from the state to Appellant. A review of the charge reveals that the trial court instructed the jury on the essential elements of murder, as well as the lesser included offenses of voluntary manslaughter and reckless homicide. Following the description of the elements of each crime, the trial court instructed the jury that if the state did not prove each element beyond a reasonable doubt, the jury must acquit Appellant. After instructing the jury on the essential elements of each crime, the trial judge provided the self-defense instruction. Therefore, the jury would never even consider the affirmative defense unless they had already determined that Appellant was guilty of one of the charged crimes.

{¶74} The self-defense instruction correctly stated that Appellant had to prove by a preponderance of the evidence that he acted in self-defense. Contrary to Appellant's argument, the trial court did not instruct the jury that the burden of proof "shifted" to Appellant, but, rather, that a defendant asserting self-defense must prove it by a preponderance of the evidence. Because the jury would not need to examine the elements of this defense unless they had found every element of the underlying crime had already been proven, it is completely accurate to say that if the defense falls short, the accused must be found guilty.

{¶75} While the prosecutor was wrong in his comments, the state's wholly incorrect interpretation of the effect of the affirmative defense of self-defense was

directly contradicted and, therefore, cured by the jury charge. Appellate courts must presume the jury followed the court's instructions during deliberation. See, e.g., *State v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190, 813 N.E.2d 637, at ¶147.

{¶76} Finally, there is considerable evidence in the record from which the jury could have concluded that Appellant was guilty of murder. In other words, this is not a case where the evidence was slight, and, therefore, we could find that the jury convicted Appellant because of confusion regarding the state's burden of proof on the elements. Accordingly, Appellant's fifth and seventh ineffective assistance of counsel claims and his second assignment of error are overruled.

Ineffective Claim No. 6

{¶77} "Defense counsel failed to advocate on behalf of Defendant-Appellant during final argument to the jury by abandoning his responsibility to his client through the use of disparaging and derogatory remarks which were against his client's penal interests and which served only to prejudice the jury against him."

{¶78} In an effort to explain why Appellant fled the murder scene instead of admitting that he shot Bush in self-defense, Appellant's trial counsel conceded that Appellant was involved in criminal activity concerning guns and drugs in order to show that the police would not have believed his story and that he would have been arrested. Appellant's trial counsel argued that the police and law-abiding citizens want individuals like Appellant locked up, and Appellant knew that if he admitted he shot Bush that he would have gone to jail.

{¶79} The following excerpt of the closing argument of Appellant's trial counsel is taken from Appellant's brief:

{¶80} "See, the government [* * *] is [* * *] relying on the possibility [* * *] that even you, ladies and gentlemen, would rather see [Appellant] off the streets, and it's not a bad idea. Why not? I mean, he -- he's involved with drugs, was convicted of it, obviously didn't learn his lesson. Well, you know, why not convict him? [* * *] What if we let him out? We let him out and maybe next time -- maybe next time it is [Appellant] that dies." (Appellant's Brf., p. 25.)

{¶81} In his excerpt, Appellant excludes the relevant portion of the argument. His trial counsel answered the foregoing questions, "[w]ell, once again, because you took an oath, and the oath is -- they're not just words." (Tr., p. 1028.) The crux of counsel's argument on behalf of Appellant was that the police and the state were trying to convict Appellant because he was a drug dealer. In his closing argument, he conceded that Appellant was a drug dealer, and, perhaps a segment of society might think that he was better off in jail, but he underscored the fact that the jury must only convict Appellant if the state proved beyond a reasonable doubt that he committed the crimes alleged in the indictment.

{¶82} As stated earlier, compelling evidence was adduced at trial to establish that Appellant murdered Bush. As a consequence, Appellant's argument that the jury convicted him solely to get a drug dealer off the streets is without merit. Counsel's arguments, particularly after Appellant testified, himself, at trial, appear to be within the bounds of trial tactic. Appellant suffered no prejudice as a result of his counsel's

observations during closing arguments. Accordingly, Appellant's sixth ineffective assistance of counsel claim is overruled.

Ineffective Claim No. 8

{¶83} "Defense counsel's decision to waive the test for reasonableness as part of a self-defense instruction unduly prejudiced Defendant-Appellant's right to a fair trial and the effective assistance of counsel."

{¶84} Appellant's trial counsel did not request an instruction that explained to the jury that a defendant need only have a reasonable belief that he was in imminent danger of death or great bodily injury and that his only reasonable means of escape was the use of deadly force. Hence, even though the defendant may have been mistaken about the threat to his life, he may still claim self-defense. Appellant contends that, "waiver of this instruction by his counsel impacted him adversely by limiting the jury's ability to favorably consider testimonial evidence consistent with instructions of law that may have been exculpatory of Defendant-Appellant's conduct." (Appellant's Brf., p. 26.)

{¶85} First, it is important to note that the instruction provided to the jury, that Appellant must show that he had a bona fide belief that he was in imminent danger of death or great bodily harm, includes a reasonableness element. In other words, the jury was not instructed that Appellant had to prove by the greater weight of the evidence that his life was in danger, but only that he had a bona fide belief that it was in danger.

{¶86} Second, based upon Appellant's testimony, the proposed instruction would not have changed the outcome of the trial. Evidently, the jury did not believe Appellant's version of the events of August 25, 2006, or, in the alternative, they did not believe that the situation described by Appellant warranted the use of deadly force. Even if the proposed jury instruction would have been requested and read into the instructions, there is no reason to believe that it would have changed the outcome of the trial.

{¶87} In summary, Appellant has failed to demonstrate that, but for his counsel's conduct, his trial would have resulted in an acquittal. He has also failed to show that the jury instructions on self-defense were incorrect. For these reasons, both of Appellant's assignments of error are overruled and his conviction is affirmed.

Donofrio, J., concurs.

Vukovich, P.J., concurs.