[Cite as *State v. Brogan*, 2024-Ohio-4601.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
Appellee	:	C.A. No. 30052
v.	:	Trial Court Case No. 2022 CR 03404
CORNELIUS DAVON BROGAN	:	(Criminal Appeal from Common Pleas Court)
Appellant	:	

. . . .

O P I N I O N

Rendered on September 20, 2024

. . . .

CHIMA R. EKEH, Attorney for Appellant

MATHIAS H. HECK, JR., by ANDREW T. FRENCH, Attorney for Appellee

. . . .

TUCKER, J.

{¶ 1} Defendant-appellant Cornelius Davon Brogan appeals from his conviction for murder. For the reasons set forth below, we affirm.

I. Facts and Procedural Background

{¶ 2} On the evening of November 27, 2022, friends of the victim went to his home after he did not show up to a party and did not respond to attempts to reach him on his cellphone. The friends found his body inside his home and called the police. Riverside Police arrived on the scene at approximately 6:00 p.m. An officer asked the friends if they were aware of anyone with whom the victim had problems or who might be responsible for the victim's death. In response, Brogan's name and phone number were provided to the police.

{¶ 3} The police learned the victim's neighbor had a surveillance camera. Video from the camera showed a blue Toyota arriving at the victim's home at approximately 10:11 a.m. on the morning of the murder. The person operating the vehicle was wearing a long black coat with a black hoodie pulled up on his head, and he exited the car and walked toward the home. The person remained in the home for less than six minutes, then exited and walked back to the car while drinking from a soda can. The police confirmed that Brogan was the owner of a blue Toyota. The police were able to trace Brogan's cellphone to a trailer park in Kentucky near the border with Tennessee. Local sheriff's deputies were dispatched to the trailer park where they located Brogan's car in front of a trailer. The deputies knocked on the door, and it was opened by Owen Sitz, the owner of the trailer. Brogan was present and was ordered to exit the trailer. As he did so, Brogan lunged at a deputy and attempted to grab his weapon.

{¶ 4} Brogan was extradited to Ohio and was indicted on one count of purposeful

murder, two counts of felony murder, and two counts of felonious assault. Brogan filed a notice of his intent to present a claim of self-defense. A jury trial was conducted in November 2023.

{¶ 5} At trial, the State presented evidence that the victim had been stabbed 10 times and had five other cuts to his body. Additionally, the State presented evidence that a search of Sitz's property had been conducted; the police found Brogan's shoes there, and the shoes matched the bloody shoe prints found inside the victim's home and had the victim's DNA on them. Inside Brogan's car, the police found a bloody coat, a pocketknife with the victim's blood on it, and a can of Diet Coke that tested positive for both Brogan's and the victim's DNA. The can's serial number matched the serial number of a case of Diet Coke located in the victim's basement refrigerator. When Riverside police travelled to Kentucky to obtain Brogan's fingerprints and a DNA swab, Brogan stated that he hoped the detectives were able to catch the victim's killer. Brogan did not mention any contact with the victim or that he had killed him in self-defense at that time.

{¶ 6} Owen Sitz testified for the State. He testified that he met Brogan online sometime in July or August 2022. The two communicated online and by text but did not meet in person until the day of the murder. According to Sitz, he woke up around 11:52 a.m. on November 27 and noticed that he had received a text from Brogan at 4:09 a.m.[1] Brogan's text indicated that he was staying in a shelter. Sitz informed Brogan that he was welcome to come to stay at Sitz's home. Brogan texted "yeah, I'll come down and stay with you tonight and fill you in." He also asked for Sitz's address.

---

[1] Sitz lives in the Central Time Zone, and the times he gave for the texts between him and Brogan were Central Time.

{¶ 7} Later, at 1:23 p.m., Brogan texted, "I'm excited to see u." Sitz responded and texted his address. More texts were exchanged around 4:08 p.m. and 6:41 p.m. Brogan indicated he would arrive around 7:22 p.m. Sitz then texted that timing was good because he needed to shower. Brogan responded, "just wait n shower." Sitz replied, "nah fell gross lol gotta shower now." Brogan then texted, "Pleeeasee lol" and "I'm so excited to see you."

{¶ 8} According to Sitz, Brogan arrived at his home at 7:30 p.m. After talking for a few minutes, Brogan took a shower. The pair then sat together on the bed and watched television while smoking marijuana. Sitz testified that he had been very close to Brogan and had not noticed any injuries or bruising on Brogan other than small cuts, similar to papercuts, on his hands.

{¶ 9} Sitz testified that Brogan received a cellphone call about an hour after he arrived; Brogan began to act "strange or nervous" after the call, and his demeanor changed. Approximately 20 minutes after the call, the two men heard a knock at the door. Sitz left the bedroom, looked out a window, and observed deputies. Sitz asked, "why are the cops here?" He then saw Brogan standing in the doorway of the bedroom. Brogan said, "I'm not here." Sitz opened the door and allowed the deputies in. At that point, Brogan had opened the back door to the home. Sitz testified that Brogan lunged at a deputy and a "scuffle" ensued.

{¶ 10} Brogan testified in his defense. He indicated that he and the victim had been in an intimate relationship but had broken up about a year prior to the murder. Brogan stated that he went to the victim's home around 10:00 a.m. on the day of the

murder. According to Brogan, the victim told him that he could not hang out because he had plans. Brogan walked toward the door and said, "fine, I didn't want to hang with you anyway you drunk bitch"; Brogan testified that the victim then jumped him and placed him in a chokehold with his left arm. Brogan testified that he was bent backwards because the victim was several inches shorter. Brogan became scared, so he pulled his knife from his pants pocket and opened it; he testified that he was going to stab the victim in the leg, but the victim's dog ran into them and knocked them over. Brogan fell onto his back and the victim fell onto his front with his arm over Brogan. Brogan testified that he reached up and stabbed the victim in the back and rolled out of his grip.

{¶ 11} According to Brogan, he then began to back away as the victim stood up. However, the victim looked angry and "came after" him. Brogan testified that he said, "please stop, you're scaring me." The victim replied, "I'm not a fucking drunk bitch." Brogan continued to back away from the victim and stated that he had been joking when he made that comment. Brogan testified that the victim "came over the top of" him and started punching him in the face. The victim also grabbed Brogan's neck with his left hand. Brogan testified that the victim punched him in the face multiple times.

{¶ 12} According to Brogan, the victim then started to choke him with both hands and he started to get "tunnel vision." Brogan used his legs to flip the victim onto his back; Brogan had the knife in his right hand and began to stab the victim in the chest. He testified that the victim put his hand up to his chest and that he stabbed him through the hand into the chest. At this point, Brogan stopped stabbing the victim, and the victim was struggling to breathe. Brogan testified he then went to the basement to get a soda

from the refrigerator. When he returned upstairs, Brogan noticed the victim was not moving. He then left and closed the door behind him.

{¶ 13} Brogan testified that he thought he should call the police, but his phone was not in his car. He then thought he might have left his phone at his gym.[2] He went to the gym and took a shower. He testified that he then decided to commit suicide, and he went to Trader's World and a gun shop to buy a gun. When he was unable to obtain a gun, he decided he could kill himself by jumping off a mountain. He therefore texted Sitz to see if he could stay with him for a night. Brogan testified that he intended to stay one night and then find a cliff the next day.

{¶ 14} Brogan stated that he arrived at Sitz's home around 7:30 that evening; he applied concealer and foundation before entering because his face was bruised and scraped. Brogan testified that he sat on Sitz's bed researching how to create a will because he wanted to leave his car to his brother. They heard a knock on the door. Sitz went to the door and indicated the police were there. Brogan said, "I'm not here"; he thought he could try to run and let the police shoot and kill him.

{¶ 15} On cross-examination, Brogan admitted that he was taller than the victim. He also stated that when he spoke to the police, he did not say "I hope you find them." He testified that he actually said "I hope my time ends."

{¶ 16} The jury found Brogan guilty on all of the charges. At the sentencing hearing, the trial court merged all of the counts, and the State elected to proceed to sentencing on the count of purposeful murder. The trial court sentenced Brogan to a

---

[2] Brogan testified that he was homeless at the time and living out of his car. He further testified that he had a gym membership and that he would shower at the gym.

mandatory prison term of 15 years to life.

{¶ 17} Brogan appeals.

II. Self-Defense

{¶ 18} Brogan's first assignment of error states:

> THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT BROGAN'S USE OF DEADLY FORCE WAS NOT IN SELF-DEFENSE

{¶ 19} Brogan claims his conviction for murder was against the manifest weight of the evidence. In support, he argues that the State failed to prove that he did not act in self-defense when he killed the victim.

{¶ 20} A claim of self-defense involving deadly force requires evidence that, among other things, "the defendant had a bona fide belief that he or she was in danger of death or great bodily harm." *State v. Barker*, 2022-Ohio-3756, ¶ 22 (2d Dist.). It also "requires evidence that the defendant had both an objectively reasonable belief and a subjective belief that force was necessary to protect himself or herself." *Id.* at ¶ 27. Additionally, a self-defense claim requires consideration of the force used relative to the danger. "If the force used was so disproportionate that it shows a purpose to injure, self-defense is unavailable." *Id.*

{¶ 21} When a defendant presents evidence at trial tending to support that he or she used force in self-defense, the State must then prove, beyond a reasonable doubt, that the defendant did not act in self-defense. R.C. 2901.05(B)(1). To prevail, the State

need only disprove one element of a self-defense claim. *State v. Knuff*, 2024-Ohio-902, ¶ 191. The Ohio Supreme Court has held that the State's self-defense burden is "subject to a manifest-weight review on appeal." *State v. Messenger*, 2022-Ohio-4562, ¶ 27. *See also State v. Butler*, 2023-Ohio-3504, ¶ 17 (2d Dist.).

{¶ 22} When a conviction is challenged on appeal as being against the weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, and determine whether, in resolving conflicts in the evidence, the trier of fact "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997). A judgment should be reversed as being against the manifest weight of the evidence "only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983).

{¶ 23} "Because the factfinder . . . has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness." *State v. Lawson*, 1997 WL 476684, *4 (2d Dist.). "The fact that the evidence is subject to different interpretations does not render the conviction against the manifest weight of the evidence." *State v. Adams*, 2014-Ohio-3432, ¶ 24 (2d Dist.).

{¶ 24} With the foregoing standards in mind, we reject Brogan's challenge to the jury's determination. The jury reasonably could have found Brogan's testimony lacking in credibility. First, despite claiming that the victim repeatedly punched him in the face, had him in a chokehold, and later used both hands to strangle him, Sitz did not observe any injuries to Brogan. Brogan attempted to counter Sitz's testimony by claiming that he applied foundation and concealer to hide his injuries. However, Sitz testified that Brogan showered when he reached Sitz's home and then spent at least 20 minutes sitting next to Sitz while they watched television. The jury was free to give more credence to Sitz's testimony.

{¶ 25} Additionally, the jury was free to conclude that Brogan's actions were more consistent with consciousness of guilt than with acting in self-defense. The evidence showed that Brogan first texted Sitz before he went to the victim's home. After the altercation with the victim, Brogan admitted that, rather than calling for help, he left the victim struggling to breathe while he went to the basement to get a drink. He then left the house and walked to his car at a normal pace. Brogan went to his gym to shower and change his clothes. He then proceeded to text with Sitz and leave town. According to Sitz, Brogan was relaxed, talkative, and friendly until he got a phone call and began to act nervous and distracted. Brogan instructed Sitz to deny his presence in the home when the police arrived. Brogan also attempted to fight the arresting deputies. Finally, after being arrested, he told the police that he hoped they caught the killer; he did not make any claim that he had killed the victim in self-defense.

{¶ 26} Self-defense claims generally involve the issue of witness credibility. *State*

v. Campbell, 2024-Ohio-1693, ¶ 32 (8th Dist.). " 'Disputes in credibility for the purposes of evaluating self-defense are best resolved by the trier of fact.' " *Id.* "When weighing witness testimony supporting a claim of self-defense, the trier of fact is 'free to believe or disbelieve the testimony of the witnesses' and 'is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimony is credible.' " (Citations omitted.) *Id.*

{¶ 27} Having reviewed the record, we cannot conclude that the jury clearly lost its way in rejecting Brogan's claim of self-defense. Accordingly, the first assignment of error is overruled.

III. Voluntary Manslaughter Instruction

{¶ 28} The second assignment of error is as follows:

> THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ON A VOLUNTARY MANSLAUGHTER CHARGE VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL AND DUE PROCESS UNDER THE OHIO CONSTITUTION AND THE UNITED STATES CONSTITUTION

{¶ 29} Brogan asserts the trial court erred by failing to provide a jury instruction on voluntary manslaughter as an inferior-degree offense of murder.

{¶ 30} At the outset, we note that Brogan did not request a voluntary manslaughter instruction. Thus, we review this assignment of error under the plain error standard. "Notice of plain error 'is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " *State v. Lang*,

2011-Ohio-4215, ¶ 108, quoting *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph three of the syllabus.

{¶ 31} "Voluntary manslaughter is an inferior degree of murder[.]" *State v. Shane*, 63 Ohio St.3d 630, 632 (1992). "Voluntary manslaughter is proscribed in R.C. 2903.03(A), which states that '[n]o person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly cause the death of another . . .' " *State v. Bonaparte*, 2019-Ohio-2030, ¶ 69 (2d Dist.). "Thus, unlike murder, voluntary manslaughter includes the mitigating element of serious provocation by the victim reasonably sufficient to incite the defendant into using deadly force." *Id.*, citing *State v. Thomas*, 2003-Ohio-42, ¶ 17. (2d Dist.).

{¶ 32} "This court has recognized that a self-defense argument generally is inconsistent with a serious-provocation theory." *State v. Newby*, 2024-Ohio-1391, ¶ 72, quoting *State v. Dixon*, 2022-Ohio-3157, ¶ 22 (2d Dist.). Therefore, "self-defense and . . . voluntary-manslaughter instructions are incompatible in most cases," but we have "recognized . . . that the two theories conceivably might be compatible where a defendant is found to have exceeded the degree of force necessary to defend himself because he acted out of passion or rage." *Id.*

{¶ 33} In deciding whether to provide a lesser-included or inferior-offense instruction, a trial court must find sufficient evidence to allow a jury to reasonably reject the greater offense and to find a defendant guilty on a lesser-included or inferior-degree offense. *State v. Ferrell*, 2020-Ohio-6879, ¶ 35 (10th Dist.). When the evidence

pertaining to a lesser-included offense or inferior-degree offense meets this test, a trial court must instruct the jury on the lesser-included or inferior-degree offense. *State v. Conley*, 2015-Ohio-2553, ¶ 32 (2d Dist.).

{¶ 34} In this case, Brogan asserted a claim of self-defense. He made no request for a serious provocation instruction. The only evidence presented by Brogan regarding his state of mind was his claim that he was scared when the victim allegedly attacked him. Brogan simply did not present any claim or evidence to support a finding that he was acting in a fit of passion or rage. There was no testimony to demonstrate that Brogan was angry or that he lost control of himself. Indeed, he merely testified that he stabbed the victim until the victim quit trying to “come after me.” In other words, Brogan’s testimony established that he was scared and that, while he did stab the victim multiple times, he did so only for so long as it took to incapacitate the victim and prevent him from continuing to assault him.

{¶ 35} Absent sufficient evidence of serious provocation, it was not plain error for a trial court to fail to instruct the jury sua sponte on voluntary manslaughter. *See State v. Moore,* 2004-Ohio-3398, ¶ 13 (2d Dist.). On this record, we cannot conclude there was sufficient evidence of serious provocation. Thus, the trial court did not err, let alone commit plain error, in failing to instruct the jury on voluntary manslaughter.

{¶ 36} The second assignment of error is overruled.

IV. Ineffective Assistance of Counsel

{¶ 37} The third assignment of error asserted by Brogan is:

BROGAN WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, AT TRIAL, IN VIOLATION OF HIS RIGHT TO SAME UNDER THE OHIO CONSTITUTION AND THE UNITED STATES CONSTITUTION

{¶ 38} Brogan claims his trial counsel was ineffective for failing to request an instruction on voluntary manslaughter and for failing to request an expert on chokeholds.

{¶ 39} We review alleged instances of ineffective assistance of trial counsel under the two-prong analysis set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by the Supreme Court of Ohio in *State v. Bradley*, 42 Ohio St.3d 136 (1989). To prevail on a claim of ineffective assistance, Brogan must show that trial counsel rendered deficient performance and that counsel's deficient performance prejudiced him. *Strickland* at paragraph two of the syllabus; *Bradley* at paragraph two of the syllabus. In the absence of a showing of either deficient performance or prejudice, a claim of ineffective assistance of counsel fails. *Strickland* at 697.

{¶ 40} To establish deficient performance, a defendant must show that trial counsel's performance fell below an objective standard of reasonable representation. *Id.* at 688. In evaluating counsel's performance, a reviewing court “must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.” *Id.* at 689. “The adequacy of counsel's performance must be viewed in light of all of the circumstances surrounding the trial court proceedings.” *State v. Jackson*, 2005-Ohio-6143, ¶ 29 (2d Dist.).

{¶ 41} To establish prejudice, a defendant must show that there is “a reasonable probability that, but for counsel's errors, the proceeding's result would have been

different." *State v. Hale*, 2008-Ohio-3426, ¶ 204, citing *Strickland* at 687-688 and *Bradley* at paragraph two of the syllabus. " 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *Bradley* at 142, quoting *Strickland* at 694.

{¶ 42} In reviewing ineffective assistance claims, we must not second-guess trial strategy decisions. *State v. Mason*, 82 Ohio St.3d 144, 157 (1998). Therefore, "trial counsel is allowed wide latitude in formulating trial strategy[.]" *State v. Olsen*, 2011-Ohio-3420, ¶ 121 (2d Dist.). "Debatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel, even if, in hindsight, it looks as if a better strategy had been available." *State v. Conley*, 2015-Ohio-2553, ¶ 56 (2d Dist.), citing *State v. Cook*, 65 Ohio St.3d 516, 524-525 (1992).

{¶ 43} We turn first to the claim that trial counsel should have requested a jury instruction on voluntary manslaughter. We presume such an instruction was not requested, as a matter of trial strategy, because Brogan's own testimony did not reflect that he had acted under a sudden passion or in a fit of rage. Instead, he attempted to portray himself as being scared. His testimony indicated that he stabbed the victim not in a fit of rage or sudden passion, but merely in an attempt to stop his assault. Indeed, his testimony indicated that he used only as much force as was required to make the victim stop attacking him. Under these circumstances, we cannot say counsel was ineffective for failing to request a voluntary manslaughter instruction.

{¶ 44} Brogan next contends a chokehold expert could have helped the jury understand the mental effects of being held in a chokehold and could have explained the

absence of any injuries to Brogan's throat.

{¶ 45} We cannot speculate concerning how such an expert may have testified. Moreover, Brogan's testimony indicated that the altercation began when the victim grabbed him and placed him in a chokehold, which was maintained for a matter of seconds, during which time he claimed he could not breathe. He did not claim he experienced any loss or alteration of consciousness at that time. Indeed, he testified that he was alert enough to decide to stab the victim in the leg, reach into his pocket, and remove and open his pocketknife. Brogan later claimed that the victim had tried to strangle him with both hands and that he began to have tunnel vision. However, he testified he was able to place his legs "between [the victim's] waist and knees" and flip him onto his back on the floor. It was then that Brogan began to stab the victim in the chest.

{¶ 46} We cannot conclude that the use of a chokehold expert would have aided Brogan's defense when his own testimony indicated that he was able to think clearly and counteract the victim's assault. Further, while Brogan did claim to have tunnel or blurry vision when the victim strangled him, he in no way claimed that it had caused him to act in rage or a fit of passion. Instead, his testimony indicated that he was able to act to defend himself and that his actions were merely aimed at stopping the assault. He was also coherent enough to be able to recall and give detailed testimony about which arm the victim had used for the chokehold and later to grab Brogan by the throat. Additionally, even if an expert had opined that the chokehold and strangulation might not have caused bruising, we cannot conclude such testimony would have changed the

outcome of the trial.

{¶ 47} The third assignment of error is overruled.

V. Cumulative Error

{¶ 48} Brogan's fourth assignment of error provides as follows:

THE CUMULATIVE EFFECT OF ALL THE ERRORS DENIED BROGAN A FAIR TRIAL

{¶ 49} To find cumulative error, we first must find multiple errors committed at trial, and secondly, we must conclude that a reasonable probability exists that the outcome of the trial would have been different but for the combination of the harmless errors. *State v. Zimpfer*, 2014-Ohio-4401, ¶ 64 (2d Dist.).

{¶ 50} Based upon our above discussion of the alleged instances of error, we conclude that Brogan has failed to establish that any error occurred. Therefore, he cannot demonstrate cumulative error.

{¶ 51} The fourth assignment of error is overruled.

VI. Conclusion

{¶ 52} All of Brogan's assignments of error are overruled. The judgment of the trial court is affirmed.

. . . .

EPLEY, P.J. and HUFFMAN, J., concur.