[Cite as *State v. Hubbard*, 2013-Ohio-2735.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 11AP-945
v.	:	(C.P.C. No. 10CR-09-5694)
Dawntwai M. Hubbard,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 27, 2013

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher*, for appellee.

John H. Pettorini, for appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Defendant-appellant, Dawntwai M. Hubbard ("defendant"), appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty, pursuant to a jury verdict of one count of murder in violation of R.C. 2903.02, one count of attempted murder in violation of R.C. 2923.02 as it relates to R.C. 2903.02, and one count of felonious assault in violation of R.C. 2903.11, all with firearm specifications. Because: (1) sufficient evidence and the manifest weight of the evidence support defendant's convictions, (2) plaintiff-appellee, the State of Ohio ("State"), did not violate defendant's right to confront the witnesses against him, (3) the trial court did not plainly err by failing to instruct the jury on the lesser-included offense of reckless homicide, (4) the trial court did not abuse its discretion by refusing to instruct the jury on defendant's requested jury instructions, (5) no prejudicial prosecutorial misconduct occurred, and (6) the trial court

properly refused defendant's request to merge the convictions, but failed to make the findings required by R.C. 2929.14(C)(4) before imposing consecutive sentences, we affirm in part and reverse in part, remanding the case for resentencing.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On September 27, 2010, the State indicted defendant on one count of aggravated murder, an unclassified felony, one count of attempted murder, a first degree felony, one count of murder, an unclassified felony, and one count of felonious assault, a second degree felony, all with firearm specifications in accordance with R.C. 2941.145. The events giving rise to the indictment occurred on September 18, 2010, on the near east side of Columbus, Ohio.

{¶ 3} Throughout the daytime hours on September 18, 2010, defendant's 19-year-old neighbor, Ravenna Bronaugh, and her group of friends had numerous verbal and physical altercations with defendant's 14-year-old daughter and her group of friends. Defendant and his daughter lived at 422 Morrison Avenue, while Bronaugh lived at 396 Morrison Avenue, five houses north from defendant's house on the same side of the street. The police responded to several calls from the area throughout the day to break up the fighting between the two groups. As a neighbor explained, the day "appear[ed] to be a series of escalat[ing] arguments and tempers were getting hotter and hotter." (Tr. 274.)

{¶ 4} Around 8:00 p.m., the fighting between the two groups had died down, defendant's daughter and her friends were inside defendant's home, and Bronaugh and her friends were on Bronaugh's front porch. At that time, Lavada McCurdy, Bronaugh's good friend, and Bronaugh left the group at 396 Morrison Avenue and walked down the street to defendant's house. McCurdy picked up a cement block on the walk and, while standing in defendant's front yard, she "threw it at [defendant's front] window and busted it." (Tr. 348.) The group standing on Bronaugh's porch walked out to the sidewalk to see what had happened. McCurdy and Bronaugh started to walk back to 396 Morrison Avenue, stopping to talk to another individual on the street, when suddenly they "started hearing shots." (Tr. 352.)

{¶ 5} The witnesses from 396 Morrison Avenue explained that, after McCurdy and Bronaugh broke defendant's window, defendant came out "on the porch and start[ed] shooting." (Tr. 546.) McCurdy stated that, as she was running, she turned around and

"noticed it was [defendant]" shooting. (Tr. 352.) Another witness explained that the shots were coming "down Morrison from [the direction] which [McCurdy] and [Bronaugh] were walking from." (Tr. 602.) As the shots were being fired, Teddy McGrapth and Candace Keys, who had arrived at 396 Morrison Avenue minutes before the shooting, started yelling that they had been shot. McGrapth walked back from the sidewalk to the steps in front of 396 Morrison Avenue, sat down and started taking "deep breathe[s] and blood started coming out." (Tr. 353.) McGrapth died from the gunshot wound to his torso.

{¶ 6} There were several individuals inside defendant's house when the cement block came crashing through the window. The witnesses from inside defendant's house testified to hearing two gun shots either immediately before or immediately after the brick came through the window. Other witnesses for the State, however, testified that the only gunshots they heard that evening were the shots fired from defendant's gun. Defendant's daughter testified that, after she heard the gunshots and the cement block crash through the window, her father entered from the "rear of the house" and instructed everyone to "go upstairs." (Tr. 852.) Defendant's daughter "got on the ground and * * * climbed up the stairs," and then heard gunshots, approximately "four or five." (Tr. 852, 867.)

{¶ 7} Defendant testified at trial. He explained that when he returned home around 8:00 p.m. from a brief outing with a friend, he saw a "group of people carousing and gathering," on Morrison Avenue. (Tr. 1183.) Defendant stated that he entered his house through the back door, heard approximately two gunshots followed by a terrifying crash, retrieved the gun which he had placed behind the mantel earlier in the day, and walked out onto his front porch. Defendant saw people approaching "from [his] yard coming closer" and, because he "didn't want to harm no one," he grabbed the pillar on the side of his porch, and shot "to the side and down to warn them, back, just back up." (Tr. 1195-96; 1199-1200.) Defendant explained that he fired his gun "down towards the ground" in the direction of the abandoned house immediately north from his house and in the vicinity of a green trash can sitting in front of the abandoned house. (Tr. 1202-03.) Defendant explained that he did not intend to kill or harm anyone when he shot his gun.

{¶ 8} Allison Fife, defendant's neighbor at 430 Morrison Avenue, witnessed the shooting. Fife explained that at approximately 8:00 p.m. she saw a group of people

standing down the street from her house and saw someone from the group run towards defendant's house and throw something that "went through the window." (Tr. 220.) About a minute after the window broke, defendant walked out onto his front porch, grabbed a hold of the brick pillar, and fired four or five shots in rapid succession while pointing his gun "[t]owards the group" standing down the street. (Tr. 223.) Fife, and other witnesses from 396 Morrison Avenue, stated that when defendant fired his gun, there was no one standing in front of his house.

{¶ 9} Police arrived shortly after the shooting. Detective Gregory Sheppard stated that "[s]everal of the witnesses stated that the person that actually committed the shooting was [defendant] and that he lived at 422 Morrison." (Tr. 878.) Police entered defendant's home and, as they proceeded to the second floor of the house, they heard "like steps or some creaking in another level of the house" and told whoever was upstairs to come down. (Tr. 656.) Defendant came down the stairs and officers noted that, while defendant was "sweating from his forehead," his shirt "was very dry" causing the officers to "believe that maybe [defendant] just changed his shirt or something like that." (Tr. 657.) Witnesses from the scene told officers that defendant had "ran and changed his clothes," as defendant wore a white "wife beater" undershirt during the day, but had on a yellow T-shirt when police found him. (Tr. 287, 354.)

{¶ 10} Police recovered five spent Winchester 45-automatic shell casings on and around defendant's front porch. Inside defendant's house, in a large box underneath a bed, police found a "handgun and some ammunition along with a gun box." (Tr. 681-82.) The ammunition was Winchester 45-automatic ammunition. The gun box was for a Hi-Point firearm, and contained a receipt from Vance's gun shop, evidencing the sale of a Hi-Point 45-automatic firearm to defendant on October 12, 2007. The gun was not inside the gun box, rather it was "stuck down in" the larger box. (Tr. 513.) The magazine had eight live rounds in it.

{¶ 11} Forensic testing revealed that the five spent shell casings from defendant's front porch were fired from the Hi-Point firearm. The bullet which caused McGrapth's death was also fired from the Hi-Point firearm. Samples taken from defendant's hands on the night of the incident revealed gunshot primer residue, indicating that defendant had fired a gun that day.

{¶ 12} Defendant's trial concluded on October 4, 2011. The jury found defendant guilty of attempted murder and felonious assault relative to Keys, found defendant guilty of murder regarding McGrapth, and found defendant guilty of the firearm specifications for each crime. The jury was unable to reach a verdict on the aggravated homicide charge and a nolle prosequi was entered as to Count 1 of the indictment. The court sentenced defendant to a prison term of 15 years to life on the murder charge, 7 years on the attempted murder charge, and 3 years on each firearm specification. The court ordered that the sentences be served consecutively, for a total prison term of 28 years to life.

II. ASSIGNMENTS OF ERROR

{¶ 13} Defendant appeals, assigning the following errors:

> [I.] Hubbard's convictions are against the manifest weight of the evidence.
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> [II.] Mr. Hubbard was denied due process of law and a fair trial, when the trial court failed to instruct the jury regarding the affirmative defense of 'self defense and/or defense of another', including a 'Castle Doctrine' instruction (effective September 9, 2008), because this jury instruction was appropriate and required, in light of both 'sufficiency' and 'manifest' weight of evidence produced at trial.
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> [III.] Mr. Hubbard was denied due process of law and a fair trial, when the trial court failed to instruct the jury regarding "self-defense or defense of another", including a statutory required "Castle Doctrine" instruction (after September, 2008), when predicated upon this trial evidence, to wit: During the evening of September 18, 2010, Hubbard, in order to protect persons under attack in his home, from apparently armed would-be home invaders, rapidly fired five warning shots from his front porch, to dissuade and repel those invaders, seconds after they fired two shots in front of his home, and hurled a concrete block through his front porch window; however, one or more shot(s) he fired downward into the ground of an abandoned lot north of his home, strayed and/or ricocheted, struck and killed an unseen victim, Mr. McGrapth and may have also hit unseen victim, Ms. Keys' foot, while both were located in close proximity to each other, out near the darkened street, more than sixty (60) yards northwest of Hubbard's porch.
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> [IV.] Mr. Hubbard was denied due process of law and a fair trial, when the trial court failed to instruct the jury upon

defenses of "duress", "mistake", "accident", and also failed to instruct upon the doctrine of "transferred intent", under sufficient weight of evidence at trial, that one (or more) of five gunshots Hubbard fired north, in a downward direction toward an abandoned lot next to his home accidently ricocheted and/or strayed, striking unseen individuals standing in close proximity to each other in the dark, near the street, more than sixty (60) yards northwest of his front porch.

[V.] Mr. Hubbard was denied due process of law and a fair trial, when the trial court, after conclusion of all evidence established at trial, failed to instruct the jury regarding the lesser included offenses of (1) voluntary manslaughter, (2) involuntary manslaughter, (3) reckless homicide, (4) negligent homicide, and (5) aggravated assault.

[VI.] Mr. Hubbard was denied due process of law and a fair trial when the trial court failed to instruct the jury that they should consider whether or not evidence of daylight escalation of street violence outside Hubbard's home, evening gunshots heard outside his home and a hurled concrete block crashing through the front window of his home, was relevant to the jury's ultimate determination of whether Hubbard's claim of "self defense and/or defense of others" and/or a "Castle Doctrine" presumption, had been rebutted by greater weight of evidence offered by the State of Ohio.

[VII.] The trial court erred in denying Hubbard's motion for judgment of acquittal (Ohio Criminal Rule 29) at the conclusion of the State's case, since manifest weight of the evidence established that McGrapth's Homicide was accidental, and that the State's failure to compel Candace Keys to testify with respect to the State's burden of proof regarding Counts Two, Three and Four of the Indictment, all of which were predicated upon the State's underlying establishment of evidence that Hubbard knowingly committed felonious assault upon Keys, thus deprived Hubbard of his constitutional right, to confront and cross examine his accuser; face to face and in open court, regarding the exact nature, extent and cause of Keys' alleged "injury", and regarding her reasons for traveling with McGrapth from their west side apartments into an east side neighborhood she knew was filled with street gang violence and guns.

[VIII.] Mr. Hubbard was denied due process of law and a fair trial, when the trial court erroneously permitted the trial

> prosecutor to engage in prosecutorial misconduct during his closing argument by usurping the trial court's sole function to instruct the jury on the law which they 'should and/or should-not' apply to findings of fact, in determining the weight or sufficiency of evidence, to reach their verdicts regarding the indictment.
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> [IX.] Mr. Hubbard was denied due process of law and a fair trial, when the trial court erroneously provided the jury with redacted written copies of the court's orally delivered jury instruction and failed to advise the jury, upon reported inability to reach a verdict, that all further requests for jury instruction were, because of the court's previous instruction, prohibiting all written jury notes, to be strictly limited to oral jury re-instruction from the court.
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> [X.] The trial court erred in its imposition of sentence, upon the convictions.

{¶ 14} For ease of discussion, we will address defendant's assignments of error out of order.

III. FIRST AND SEVENTH ASSIGNMENTS OF ERROR—SUFFICIENCY, MANIFEST WEIGHT, AND CONFRONTATION CLAUSE

{¶ 15} Defendant's first assignment of error asserts that his convictions are against the manifest weight of the evidence presented at trial. Defendant fails to separately argue his first assignment of error, instead presenting one argument to support his first, second, third, fourth, fifth, and sixth assignments of error, in violation of App.R. 16(A)(7) and 12(A)(2). Although, pursuant to App.R. 12(A)(2), we may choose to disregard any assignment of error that an appellant fails to separately argue, in the interest of justice, we have thoroughly reviewed the record before us and conclude that the manifest weight of the evidence supports defendant's convictions. Defendant's seventh assignment of error asserts the trial court erred in overruling his Crim.R. 29 motion for acquittal, made at the close of the State's evidence, and that the State violated his Sixth Amendment right to confront the witnesses against him.

A. *Sufficiency & Manifest Weight*

{¶ 16} Pursuant to Crim.R. 29(A), a court "shall order the entry of a judgment of acquittal of one or more offenses * * * if the evidence is insufficient to sustain a conviction of such offense or offenses." Because a Crim.R. 29 motion questions the sufficiency of the

evidence, "[w]e apply the same standard of review to Crim.R. 29 motions as we use in reviewing the sufficiency of the evidence." *State v. Hernandez*, 10th Dist. No. 09AP-125, 2009-Ohio-5128, ¶ 6; *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, ¶ 37.

{¶ 17} Whether evidence is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). Sufficiency is a test of adequacy. *Id.* The evidence is construed in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus; *State v. Conley*, 10th Dist. No. 93AP387 (Dec. 16, 1993). When reviewing the sufficiency of the evidence the court does not weigh the credibility of the witnesses. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 79.

{¶ 18} Sufficiency of the evidence and manifest weight of the evidence are distinct concepts; they are "quantitatively and qualitatively different." *Thompkins* at 386. When presented with a manifest weight argument, we engage in a limited weighing of evidence to determine whether sufficient competent, credible evidence permits reasonable minds to find guilt beyond a reasonable doubt. *Conley*. *Thompkins* at 387 (noting that "[w]hen a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony"). In the manifest weight analysis the appellate court considers the credibility of the witnesses and determines whether the jury "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Id.*, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1983). Determinations of credibility and weight of the testimony remain within the province of the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. The jury may take note of any inconsistencies and resolve them accordingly, "believ[ing] all, part or none of a witness's testimony." *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶ 21, citing *State v. Antill*, 176 Ohio St. 61, 67 (1964).

{¶ 19} The jury found defendant guilty of attempted murder. To prove attempted murder, the State had to demonstrate that defendant purposely engaged in conduct which, if successful, would have caused Keys' death. R.C. 2903.02(A) and 2923.02(A). A

person acts purposely when it is his or her specific intention to cause a certain result. R.C. 2901.22(A).

{¶ 20} The jury also found defendant guilty of murder, finding defendant caused McGrapth's death as a proximate result of committing or attempting to commit a felonious assault. *See* R.C. 2903.02(B). Felonious assault under R.C. 2903.11 prohibits any person from either knowingly causing serious physical harm to another, or causing or attempting to cause physical harm to another by a means of a deadly weapon. A person acts knowingly, regardless of his purpose, when "he is aware that his conduct will probably cause a certain result or will probably be of a certain nature." R.C. 2901.22(B).

{¶ 21} The jury also found defendant guilty of the firearm specifications relative to each crime. R.C. 2941.145 provides for a three-year mandatory prison term if the offender "had a firearm on or about the offender's person * * * while committing the offense and displayed the firearm * * * or used it to facilitate the offense."

{¶ 22} The State's evidence indicated that, after McCurdy threw the cement block through defendant's window, defendant stepped out onto his porch with a Hi-Point 45-automatic pistol, pointed his firearm "[t]owards the group" of people congregating in front of 396 Morrison Avenue, and fired five shots in rapid succession. (Tr. 224.) Fife stated that defendant held his arm "straight out in front" as he pulled the trigger, directing the shots "[d]own the street into [the] group" of people. (Tr. 226-27, 246.) Fife affirmed that defendant "was not pointing the gun down" or "up in the sky" when he pulled the trigger. (Tr. 307-08.) One of the bullets from defendant's gun hit McGrapth in the back, causing his death. When defendant was shooting his gun, Keys "start[ed] screaming that she got shot in the foot." (Tr. 546-47.) Detective Stephen Glasure went to the hospital after the incident and spoke with Keys, observing that Keys "had been shot in the foot." (Tr. 679.)

{¶ 23} "A person is presumed to intend the natural, reasonable and probable consequences of his voluntary acts." *State v. Carter*, 72 Ohio St.3d 545, 554 (1995). *See also State v. Robinson*, 161 Ohio St. 213 (1954), paragraph five of the syllabus. " '[A] firearm is an inherently dangerous instrumentality, the use of which is likely to produce death.' " *State v. Seiber*, 56 Ohio St.3d 4, 14 (1990), quoting *State v. Widner*, 69 Ohio St.2d 267, 270 (1982). When a person fires a gun into a group of people, one can infer

intent to cause death. *See State v. Turner*, 10th Dist. No. 97AP-709 (Dec. 30, 1997), quoting *State v. Brown*, 8th Dist. No. 68761 (Feb. 29, 1996) (finding sufficient evidence of intent to kill when defendant fired a gun from an automobile at a group of individuals because "[t]he act of pointing a firearm and firing it in the direction of another human being is an act with death as a natural and probable consequence"); *State v. Hill*, 8th Dist. No. 87645, 2006-Ohio-6425, ¶ 16 (finding the defendant acted purposely because "[w]hen a person shoots into a retreating crowd of people, it can be inferred that he intended to cause a certain result"); *State v. Ivory*, 8th Dist. No. 83170, 2004-Ohio-2968, ¶ 6, quoting *State v. Jordan*, 8th Dist. No. 73364 (Nov. 25, 1998) (noting that " '[f]iring a gun in a person's direction is sufficient evidence of felonious assault,' " and that " '[e]ven firing a weapon randomly at victims arguably within range of the shooter is sufficient to demonstrate actual intent to cause physical harm' ").

{¶ 24} Construing the evidence in favor of the State, we conclude the evidence was sufficient to allow the jury to infer that defendant acted with the intention of causing death when he fired his gun into a crowd of people standing down the street from his house. Such evidence also supports the inference that defendant knowingly attempted to cause physical harm to another by firing his weapon into the crowd. As such, the trial court properly overruled defendant's Crim.R. 29 motion.

{¶ 25} The manifest weight of the evidence also supported defendant's convictions. The witness from 396 Morrison Avenue testified that defendant was the shooter and Fife testified that defendant held his arm straight out and fired towards the group. Defendant testified that he fired warning shots "to the side and down," towards the abandoned house next door, explaining that he had "no intentions of [any] one getting hurt" and was not "counting on a ricochet." (Tr. 1200, 1203.) The jury was under no obligation to accept defendant's testimony as truthful. *See Carter* at 554.

{¶ 26} The trial court evidence provided the jurors with reasons to find defendant's testimony less than credible. Immediately after the shooting, defendant went upstairs to the top level of his house and changed his clothes. During defendant's video recorded interview with detectives from the night of the incident, which the State played for the jury, defendant steadfastly denied any involvement in the shooting. Defendant stated he was not present when the shooting occurred, explaining that "by the time [he] got in the

house, the police had already, you know, showed up." (Tr. 901.) The detectives suggested to defendant that the shooting could have occurred in self-defense, but defendant remained adamant that he "didn't shoot nobody," that he "didn't fire a pistol." (Tr. 912.) Even when detectives told defendant that they had swabbed his hands for gunshot primer residue, defendant still stated that he had not fired a gun that day. The detectives asked defendant where the gun was located in his house and defendant told the detectives there was no gun in his house. When defendant took the stand at trial he admitted to lying to the detectives during his interview. The jury was entitled to infer consciousness of guilt from defendant's lies. *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, ¶ 54, citing *State v. Johnson*, 46 Ohio St.3d 96, 100 (1989).

{¶ 27} Although, under a manifest weight of the evidence analysis, we are able to consider the credibility of the witnesses, "in conducting our review, we are guided by the presumption that the jury, * * * is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *State v. Tatum*, 10th Dist. No. 10AP-626, 2011-Ohio-907, ¶ 5, citing *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984). Engaging in the limited weighing of the evidence which we are permitted, we cannot say the jury clearly lost its way when it found defendant guilty of murder and attempted murder, and the attendant firearm specifications, beyond a reasonable doubt. Accordingly, we find that the manifest weight of the evidence supports defendant's convictions.

B. *Confrontation Clause*

{¶ 28} Defendant also asserts under his seventh assignment of error that the State deprived him of his constitutional right to confront the witnesses against him by failing to compel Keys to testify. Defendant contends that, although Keys was "subpoenaed and served by both sides in this case," because the State did not call her to testify, she was " 'unavailable' for the Defense to cross examine." (Appellant's brief, 26.)

{¶ 29} The Sixth Amendment to the United States Constitution, in its Confrontation Clause, provides that: "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." The Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless

he was unavailable to testify and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). Thus, if the hearsay evidence sought to be admitted comprises testimony from an absent witness, who cannot be cross-examined or observed face-to-face by the trier of fact, the Confrontation Clause limits the admission of that hearsay evidence. *State v. Keairns*, 9 Ohio St.3d 228, 229 (1984). The Confrontation Clause does not apply to nontestimonial hearsay. *State v. Cassell*, 10th Dist. No. 08AP-1093, 2010-Ohio-1881, ¶ 24, citing *Crawford* at 68.

{¶ 30} Defendant contends that Keys' " 'out of court assertions' were continuously allowed into the trial record, via illicit hearsay from other witnesses." (Appellant's brief, 27.) Defendant does not provide a citation to the transcript to support this assertion, does not indicate what hearsay statements were allowed into the record, and fails to allege that such statements were testimonial. Because the State did not seek to introduce testimonial hearsay statements from Keys, the State did not violate defendant's Sixth Amendment right to confront the witnesses against him. Defendant's contentions regarding the Confrontation Clause lack merit.

{¶ 31} Based on the foregoing, defendant's first and seventh assignments of error are overruled.

IV. SECOND, THIRD, FOURTH, FIFTH, SIXTH, AND NINTH ASSIGNMENTS OF ERROR—JURY INSTRUCTIONS

{¶ 32} Defendant's second, third, fourth, fifth, and sixth assignments of error collectively assert that the trial court erred in failing to instruct the jury on self-defense, defense of others, the castle doctrine, duress, mistake, accident, transferred intent, and the potential lesser included offenses of voluntary manslaughter, involuntary manslaughter, reckless homicide, negligent homicide, and aggravated assault. Defendant's ninth assignment of error asserts that the trial court erred when it provided the jury with redacted written copies of the court's orally delivered jury instruction.

{¶ 33} Defendant's sole argument in support of his first through sixth assignments of error focuses on the trial court's failure to instruct the jury on self-defense. Defendant does not present an argument to support his fifth assignment of error, regarding the various lesser-included offenses, noting only that the trial court plainly erred in refusing "to instruct on lesser included offenses." (Appellant's brief, 25.)

{¶ 34} An appellant must support their assignments of error with an argument, which includes citation to legal authority. App.R. 16(A)(7). "An appellant bears the burden of affirmatively demonstrating error on appeal. * * * It is not the duty of this court to construct legal arguments in support of an appellant's appeal." *Camp v. Star Leasing Co.*, 10th Dist. No. 11AP-977, 2012-Ohio-3650, ¶ 67. Indeed, appellate courts may not construct legal arguments in support of an appellant's appeal. *Reid v. Plainsboro Partners, III*, 10th Dist. No. 09AP-442, 2010-Ohio-4373, ¶ 22, citing *State ex rel. Petro v. Gold*, 166 Ohio App.3d 371, 2006-Ohio-943, ¶ 94 (10th Dist.). Under App.R. 12(A)(2), we may choose to disregard any assignment of error that an appellant fails to separately argue. *See Summit Cty. Children Servs. Bd. v. State Personnel Bd. of Rev.*, 10th Dist. No. 10AP-780, 2011-Ohio-2543, ¶ 28. Although defendant fails to present an argument to support his fifth assignment of error in his brief, at oral argument, this court encouraged both parties to present arguments regarding the trial court's failure to instruct the jury on the lesser-included offense of reckless homicide. As such, in the interest of justice, we will address defendant's fifth assignment of error only as it relates to reckless homicide. Pursuant to App.R. 12(A)(2), we summarily overrule the remainder of defendant's fifth assignment of error, which defendant fails to support with an argument in his brief.

A. *Reckless Homicide*

{¶ 35} Defendant failed to timely request an instruction on any lesser-included offense in the trial court. Absent plain error, a party forfeits error concerning jury instructions if the party fails to object before the jury retires. *State v. Jackson*, 92 Ohio St.3d 436, 444 (2001); Crim.R. 30(A). However, where the failure to request a jury instruction is the result of a deliberate, tactical decision on the part of trial counsel, it is not plain error. *State v. McDowell*, 10th Dist. No. 10AP-509, 2011-Ohio-6815, citing *State v. Clayton*, 62 Ohio St.2d 45, 47-48 (1980).

{¶ 36} According to the plain error doctrine, enunciated in Crim.R. 52(B), plain errors or defects affecting substantial rights may be noticed even though they were not brought to the attention of the court. The rule places three limitations on a reviewing court's decision to correct the error, despite the absence of a timely objection at trial. *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). First, there must be an error, i.e., a deviation from a legal rule. *Id.* Second, the error must be plain. To be "plain" within the

meaning of Crim.R. 52(B), the error must be an "obvious" defect in the proceedings. *Id.* And third, the error must have affected "substantial rights," meaning the error must have affected the outcome of the trial. *Id.* "Even if a forfeited error satisfies these three prongs, however, Crim.R. 52(B) does not demand that an appellate court correct it. Crim.R. 52(B) states only that a reviewing court 'may' notice plain forfeited errors." *Id.* The Supreme Court of Ohio has admonished courts "to notice plain error 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " *Id.*, quoting *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph three of the syllabus.

{¶ 37} An offense is a lesser-included offense of another where: (1) the offense carries a lesser penalty; (2) the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and (3) some element of the greater offense is not required to prove commission of the lesser offense. *State v. Deem*, 40 Ohio St.3d 205, 209 (1988). The jury instruction on a lesser included offense must be given when "sufficient evidence is presented which would allow a jury to *reasonably* reject the greater offense and find the defendant guilty on a lesser included * * * offense." (Emphasis sic.) *State v. Shane*, 63 Ohio St.3d 630, 632-33 (1992). Thus, a jury instruction on a lesser-included offense is not required unless the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction on the lesser-included offense. *State v. Freeman*, 10th Dist. No. 07AP-337, 2007-Ohio-6859, ¶ 14, citing *State v. Carter*, 89 Ohio St.3d 593 (2000). In making this determination, "[t]he court must view the evidence in the light most favorable to the defendant." *State v. Campbell*, 69 Ohio St.3d 38, 47-48 (1994); *State v. Wilkins*, 64 Ohio St.2d 382, 388 (1980).

{¶ 38} The offense of reckless homicide provides that "[n]o person shall recklessly cause the death of another." R.C. 2903.041(A). "A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature." R.C. 2901.22(C). Felony murder premised on felonious assault, as defined above, requires that the defendant act knowingly.

{¶ 39} Pursuant to the *Deem* test, reckless homicide is a lesser included offense of felony murder because: (1) a felony murder conviction carries a prison term of 15 years to

life, while reckless homicide, a third degree felony, carries a maximum prison sentence of three years, *see* R.C. 2903.041(B), 2929.14(3)(b) and 2929.02(B)(1); (2) one cannot knowingly cause the death of another as the result of committing or attempting to commit a felonious assault without also recklessly causing the death of another; and (3) in order to prove reckless homicide the state need not establish that the defendant acted knowingly. *See also State v. Colvin*, 9th Dist. No. 26063, 2012-Ohio-4914, ¶ 17.

{¶ 40} Defendant explained that he fired five warning shots down towards the ground because he had "a burst of adrenaline, scared, * * * it was just a rapid bah, bah, bah, just, you all stop, back up." (Tr. 1206-07.) Defendant repeatedly stated during his testimony that he did not intend to harm or shoot anyone when he fired his gun.

{¶ 41} "However, a defendant's own testimony that he did not intend to kill his victim does not entitle him to a lesser-included offense instruction." *State v. Grube*, 4th Dist. No. 12CA7, 2013-Ohio-692, ¶ 38, citing *State v. Wright*, 4th Dist. No. 01CA2781 (Mar. 26, 2002). Even though the defendant's own testimony may constitute some evidence supporting a lesser offense, if the evidence on whole does not reasonably support an acquittal on the murder offense and a conviction on a lesser offense, the court should not instruct on the lesser offense. *Id.*, citing *Campbell* at 47; *Shane* at 632-33; *Wright*. "To require an instruction to be given to the jury every time 'some evidence,' however minute, is presented going to a lesser included * * * offense would mean that no trial judge could ever refuse to give an instruction on a lesser included * * * offense." *Shane* at 633.

{¶ 42} In *Wright*, the court found the trial court had abused its discretion by refusing to instruct the jury on the lesser-included offense of reckless homicide. The defendant in *Wright* testified that, when his uncle and family friend began to fight, he "shot warning shots toward the embankment" separating the alley from the yard, in an attempt to stop the fight, explaining that he "did not intend to shoot or kill anyone." *Id.* at ¶ 8, 14, 35. The defendant's testimony, however, "was [not] the only evidence of a lesser intent" because "[a]n independent witness * * * supported [defendant's] testimony" that defendant "was aiming at an embankment when he fired the gun." *Id.* at ¶ 35, 37. The court also found that "the distance between the recovered bullets and the fact that two to four bullets were never recovered may support an inference that [defendant's] shots were

not directed at" the defendant's uncle and friend, who were fighting on the ground. *Id*. at ¶ 37. The court concluded that the record contained "testimony and physical evidence from which a jury could reasonably conclude that Wright acted recklessly, but not purposely." *Id*. at ¶ 37. *See also Grube* at ¶ 42.

{¶ 43} Unlike *Wright*, in this case, there is no independent testimony or physical evidence to corroborate defendant's statements that he fired warning shots towards the ground. Fife, the only individual who could see defendant's arm as he was shooting, stated that defendant held his arm straight out in front as he fired towards the group standing in front of 396 Morrison Avenue. Defendant fired five shots from his gun, and the only bullet recovered by police was the one lodged inside McGrapth's body. Detective Sheppard stated that he instructed the other detectives to search the area between 422 and 396 Morrison Avenue in a "grid search" fashion, but the detectives did not discover any other spent bullets. (Tr. 978.) The fact that police were unable to recover another bullet from the scene supports the inference that defendant fired towards the group at 396 Morrison Avenue because, if defendant had fired down towards the ground, presumably officers would have found spent bullets in the vicinity of defendant's house or the abandoned house next door.

{¶ 44} The coroner testified that the bullet entered McGrapth's body travelling "slightly upward" and fractured McGrapth's second rib and collarbone. (Tr. 801.) The bullet recovered from McGrapth's body was deformed, and on cross-examination, defense counsel asked the coroner if the bullet could have become deformed "from perhaps a ricochet?" (Tr. 814.) The coroner responded "[i]t would be deformed from hitting a bone," but on further questioning stated it was "possible" that the bullet became deformed by "striking an object before it entered the body." (Tr. 814.) Such equivocal testimony, however, does not support defendant's statement that he was firing at the ground where the evidence demonstrated that defendant fired towards the group of people.

{¶ 45} The neighborhood surrounding Morrison Avenue was a populated, urban neighborhood where individuals had been outside fighting with one another throughout the day. In response to defense counsel's questions, defendant stated that he did not see Bronaugh, McGrapth, or Keys when he fired his weapon. Defendant admitted, however, that when he returned home only moments before the shooting, he saw "a group of people

carousing and gathering," on Morrison Avenue, stating "it was a few walking up the street and there was a few in front of my home." (Tr. 1183.) Fife, who lived at 430 Morrison Avenue, stated that from her "vantage point" she saw "more than eight" people standing in the general vicinity of "either 408 and 412 or 402 and 406" Morrison Avenue. (Tr. 291.) As Fife could see the group of people standing down the street, and defendant admitted to seeing people out on the street, the jury could only reasonably conclude that defendant would have been able to see the group standing in front of 396 Morrison Avenue when he fired his gun. The photographs of the incident also indicate that, even if defendant fired in the vicinity of the green trash can in front of the abandoned property next door, defendant was admittedly firing in the direction of the individuals standing in front of 396 Morrison Avenue. (State's exhibit Nos. 86, 33, 34.) "Shooting a gun in a place where one or more persons risk injury supports an inference defendant acted knowingly." *State v. Whatley*, 10th Dist. No. 95APA10-1375 (May 14, 1996). *See also State v. Rawlins*, 4th Dist. No. 97CA2539 (Dec. 24, 1998). As such, although defendant's testimony constituted some evidence which could support a conviction on reckless homicide, viewing the totality of the evidence presented at trial, we conclude that the jury could not reasonably have acquitted defendant on the felony murder charge.

{¶ 46} The evidence in the case revealed that defendant fired five shots in the direction of a group of people standing down the street from his house, and hit two individuals in the group. On such facts, the trial court's failure to instruct the jury on reckless homicide did not create a manifest miscarriage of justice, and thus did not rise to the level of plain error.

B. *Self-Defense/Castle Doctrine*

{¶ 47} Defendant filed a request in the trial court for additional and/or supplemental jury instructions regarding self-defense, the castle doctrine, accident, mistake of fact, and transferred intent. The trial court denied defendant's request for supplemental jury instructions, noting that the evidence presented at trial did not support a self-defense instruction.

{¶ 48} Trial courts have a responsibility to give all jury instructions that are relevant and necessary for the jury to properly weigh the evidence and perform its duty as the fact finder. *State v. Comen*, 50 Ohio St.3d 206 (1990), paragraph two of the syllabus;

Columbus v. Aleshire, 187 Ohio App.3d 660, 2010-Ohio-2773, ¶ 6 (10th Dist.). A defendant in a criminal case is entitled only to have the law stated correctly by the trial court, not to have his proposed jury instructions presented to the jury. *Columbus v. Harbuck*, 10th Dist. No. 99AP-1420 (Nov. 30, 2000), citing *State v. Snowden*, 7 Ohio App.3d 358, 363 (10th Dist.1982). Where requested jury instructions are correct statements of the law as applied to the facts of the case, they should generally be given. *Id.*, citing *Murphy v. Carrollton Mfg. Co.*, 61 Ohio St.3d 585, 591 (1991). A court reviewing a trial court's refusal to submit to the jury a requested instruction must determine whether the trial court's decision constituted "an abuse of discretion under the facts and circumstances of the case." *State v. Wolons*, 44 Ohio St.3d 64, 68 (1989).

{¶ 49} Self-defense is an affirmative defense which the accused has the burden to prove by a preponderance of the evidence. R.C. 2901.05(A); *State v. Smith*, 10th Dist. No. 04AP-189, 2004-Ohio-6608, ¶ 16. To establish self-defense through the use of deadly force, a defendant must prove that: (1) he was not at fault in creating the situation giving rise to the affray, (2) he 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) he must not have violated any duty to retreat or avoid the danger. *State v. Robbins*, 58 Ohio St.2d 74 (1979), paragraph two of the syllabus. A defendant may only use as much force as is reasonably necessary to repel the attack. *State v. Harrison*, 10th Dist. No. 06AP-827, 2007-Ohio-2872, ¶ 25, citing *State v. Jackson*, 22 Ohio St.3d 281 (1986). The elements of self-defense are cumulative, such that, "[i]f the defendant fails to prove *any one* of these elements * * * he has failed to demonstrate that he acted in self-defense." (Emphasis sic.) *Id.* at 284.

{¶ 50} "Defense of another is a variation of self-defense. Under certain circumstances, one may employ appropriate force to defend another individual against an assault." *State v. Moss*, 10th Dist. No. 05AP-610, 2006-Ohio-1647, ¶ 13. *See State v. Wenger*, 58 Ohio St.2d 336, 340 (1979). One who claims the lawful right to act in defense of another must meet the criteria for the affirmative defense of self-defense. *Moss* at ¶ 13.

{¶ 51} In most circumstances, "a person may not kill in self-defense if he has available a reasonable means of retreat from the confrontation." *State v. Williford*, 49 Ohio St.3d 247, 250 (1990), citing *Jackson* at 283-84. When a person is attacked in their

home, however, they have no duty to retreat before using force in self-defense. R.C. 2901.09(B). Commonly referred to as the castle doctrine, this exception to the duty to retreat "derives from the doctrine that one's home is one's castle and one has a right to protect it and those within it from intrusion or attack." *State v. Thomas*, 77 Ohio St.3d 323, 327 (1997), citing Annotation, Homicide: Duty to Retreat Where Assailant is Social Guest on Premises, 100 A.L.R.3d 532, 533 (1980).

{¶ 52} Effective September 9, 2008, the Ohio General Assembly further expanded the reach of the castle doctrine by creating a presumption that a person has acted in self-defense "when using defensive force that is intended or likely to cause death or great bodily harm to another if the person against whom the defensive force is used is in the process of * * * or has unlawfully and without privilege to do so entered, the residence" of the defendant. R.C. 2901.05(B)(1). Thus, in Ohio "a person is presumed to have acted in self-defense," and may use deadly force, "when attempting to expel or expelling another from their home who is unlawfully present." *State v. Johnson*, 8th Dist. No. 92310, 2010-Ohio-145, ¶ 18.

{¶ 53} Defendant's testimony demonstrated that he was not entitled to an instruction on self-defense. Defendant stated that he grabbed his gun from behind the mantle, walked out onto his front porch where he saw people approaching him from his yard, and fired his gun "to the side and down to warn them, back, just back up." (Tr. 1199-1200.) Defendant stated that he did not intend to hurt or kill anyone, emphasizing that, if he did intend to harm someone, "the people in [his] yard would have been hurt." (Tr. 1200.)

{¶ 54} " 'By its terms, self-defense presumes intentional, willful use of force to repel force or to escape force.' " *State v. Johnson*, 10th Dist. No. 06AP-878, 2007-Ohio-2792, ¶ 41 ("*Johnson I*"), quoting *State v. Williams*, 1st Dist. No. C810450 (July 28, 1982), citing *State v. Champion*, 109 Ohio St. 281 (1924). A defendant claiming self-defense "concedes he had the purpose to commit the act, but asserts that he was justified in his actions." *State v. Barnd*, 85 Ohio App.3d 254, 260 (3d Dist.1993). Thus, when an individual testifies that they did not intend to cause harm, such testimony prevents the individual from claiming self-defense. *See Johnson I* at ¶ 42-43 (where the defendant claimed that "the firearm discharged as a result of a struggle for the firearm and not as a

result of appellant's intentional and willful act of discharging the firearm" the defendant's "own testimony * * * belie[d] the application of self-defense to the shooting of [the victim]"); *State v. Herrington*, 9th Dist. No. 25150, 2010-Ohio-6455, ¶ 13 (because the defendant testified that "he did not have the intent to shoot or kill during the incident," such testimony "was inconsistent with a claim of self-defense"). Defendant's testimony that he did not fire his gun with the intention of harming anyone prevented defendant from claiming that he shot his gun in an attempt to repel force with force.

{¶ 55} Similarly, defendant was not entitled to the presumption of self-defense in R.C. 2901.05(B)(2). Defendant claimed that, when he fired his gun, there were people approaching him from his "yard coming closer," that there was "a small mob, a mass of people right here in my front yard," and that these individuals were "not on the city concrete * * * they [were] * * * in our grass, and up our sidewalk." (Tr. 1195-96, 1203.) R.C. 2901.05 creates a rebuttable presumption that a defendant acted in self-defense when someone is "in the process of unlawfully * * * entering, or has unlawfully * * * entered, the residence" of the defendant. R.C. 2901.05(B)(1). A residence means a "building or conveyance of any kind that has a roof over it," and includes "an attached porch." R.C. 2901.05(D)(2). Although defendant testified that people were in his yard, there was no evidence presented at trial to establish that anyone was in the process of unlawfully entering onto defendant's porch when defendant shot his gun. *Compare State v. Darby*, 10th Dist. No. 10AP-416, 2011-Ohio-3816, ¶ 37-38 (finding the evidence did not "support an instruction under R.C. 2901.05(B)(1) * * * because there was no evidence presented to establish that [the victim] was in the process of unlawfully * * * entering [the defendant's] residence," where the defendant's testimony "establishe[d] that [the victim] was neither in appellant's residence, nor on the stoop, nor even at the base of the stairs leading to the stoop" as the victim was "on the sidewalk outside appellant's residence"); *State v. Clark*, 6th Dist. No. F-10-025, 2011-Ohio-6310, ¶ 27 (defendant was not entitled to an instruction on the presumption of self-defense under R.C. 2901.05(B) because the altercation "occurred on the patio and not in the residence or dwelling as defined by the statute"). Because there was no evidence that anyone was attempting to unlawfully enter defendant's residence when he fired his gun, the facts did not support an instruction on the presumption of self-defense in R.C. 2901.05(B)(1).

{¶ 56} Defendant asserts that the instant case is similar to *State v. Kozlosky*, 195 Ohio App.3d 343, 2011-Ohio-4814 (8th Dist.). In *Kozlosky*, the court concluded that the defendant satisfied the elements of self-defense, as altered by the castle doctrine, where the evidence showed that the victim entered the defendant's "home * * * without permission," "ignored all demands to leave," started beating the defendant's female tenant, and the defendant shot the victim after the victim reached back for his gun. *Id.* at ¶ 16-29. Here, there was no evidence that anyone entered defendant's home and defendant did not shoot at anyone who was invading his home. While defendant asserts that "entry was accomplished by an apparently armed assailant breaking out a portion of the occupants, in order to facilitate forced entry and felonious assault of those inside," there was no evidence to establish that either McCurdy or Bronaugh were armed or that they broke defendant's window in an attempt to gain entry to the house. (Appellant's brief, 21.) Rather, the women ran back down the street towards 396 Morrison Avenue after breaking defendant's window. While the witnesses inside defendant's house testified to hearing two gunshots when the cement block came through the window, there was no evidence that those shots were directed towards defendant's house. Detective Sheppard did not observe "any bullet strikes or anything on the house," and defense witness Latoya Danielle Bradley, explained that, in the area surrounding Morrison Avenue, "there is gunfire all the time." (Tr. 977-78; 1061.)

{¶ 57} Because the evidence presented at trial was insufficient to support a jury instruction on self-defense, defense of others, or the castle doctrine, the trial court did not abuse its discretion in failing to so instruct the jury.

C. *Other Requested Instructions*

1. Accident

{¶ 58} Defendant claims the trial court erred by refusing to instruct the jury on the defense of accident. At oral argument, defense counsel asserted that an instruction on accident was appropriate in this case because defendant intended to shoot into the ground, rendering McGrapth's death and Keys' injury accidents.

{¶ 59} Accident and self-defense are generally "inconsistent by definition," as self-defense presumes intentional, willful use of force to repel force or escape force, while accident is "exactly the contrary, wholly unintentional and unwillful." *Barnd* at 260;

Champion at 286-87. "Accident" is not an affirmative defense, but "a factual defense that denies that the accused acted with the degree of culpability or mens rea required for the offense." *State v. Vance*, 5th Dist. No. 2007-COA-035, 2008-Ohio-4763, ¶ 98, citing *State v. Bayes*, 2d Dist. No. 00CA0032 (Dec. 29, 2000). *See also State v. Atterberry*, 119 Ohio App.3d 443, 447 (8th Dist.1997) (accident "is an argument that supports a conclusion that the state has failed to prove the intent element of the crime beyond a reasonable doubt").

{¶ 60} Although defendant claimed that he fired his gun toward the ground without the intention of harming anyone, the evidence indicated that he retrieved the gun which he had placed behind his mantel earlier in the day, walked out onto his porch, and fired the gun in the direction of a group of people. Such evidence does not support an accident instruction which requires evidence that the defendant acted wholly unintentionally. *Compare State v. Johnson*, 10th Dist. No. 08AP-652, 2009-Ohio-3383, ¶ 40 (finding an accident instruction appropriate where the defendant testified "that the gun accidently went off as he struggled with" the victim); *State v. Levonyak*, 7th Dist. No. 05 MA 227, 2007-Ohio-5044, ¶ 101.

{¶ 61} Moreover, a trial court does not commit prejudicial error in a criminal case when it fails to give a proposed instruction that is covered in the court's general charge to the jury. *State v. Sneed*, 63 Ohio St.3d 3, 9-10 (1992). Because the trial court properly instructed the jury regarding the elements of "knowingly" and "purposefully," if the jury had credited defendant's argument that an accident occurred, the jury would " 'have been required to find [the defendant] not guilty * * * pursuant to the court's general instruction." *Johnson I* at ¶ 63, quoting *State v. Manbevers*, 4th Dist. No. 93CA23 (Sept. 28, 1994). *See State v. Fogler*, 9th Dist. No. 08CA0004-M, 2008-Ohio-5927, ¶ 16. As such, defendant has failed to establish any prejudice resulting from the trial court's refusal to instruct the jury on accident.

2. Duress

{¶ 62} Defendant asserts the trial court failed to instruct the jury regarding duress. Defendant, however, did not request a duress instruction in the trial court and, accordingly, we review for plain error. "Duress consists of any conduct which overpowers a person's will and coerces or constrains his performance of an act which he otherwise

would not have performed." *State v. Grinnell*, 112 Ohio App.3d 124, 144-45 (10th Dist.1996). "Consequently, one who, under the pressure of a threat from another person, commits what would otherwise be a crime may, under certain circumstances, be justified in committing the act and not be guilty of the crime." *Id.*

{¶ 63} Although defendant testified that he felt "extreme duress" when he stepped out onto his porch with his gun, there was no evidence that another individual was using force to compel defendant to fire his gun. (Tr. 1198.) Defendant stated that he "stepped to that porch to protect [his] home and [his] family" because he was the "man of this home." (Tr. 1194.) Thus, defendant walked out onto his porch and fired his gun based on his own will and desire, and not as the result of a threat from someone else.

3. Mistake of Fact

{¶ 64} Although defendant requested an instruction on mistake of fact in the trial court, defendant did not explain why he was requesting the instruction, and fails to present an argument to support this instruction on appeal. Generally, mistake of fact is a defense if it negates a mental state required to establish an element of a crime, except that if the defendant would be guilty of a crime under facts as he believed them, then he may be convicted of that offense. *State v. Cooper*, 10th Dist. No. 09AP-511, 2009-Ohio-6275, ¶ 9, citing *State v. Pecora*, 87 Ohio App.3d 687, 690 (9th Dist.1993). Mistake of fact is widely recognized as a defense to specific intent crimes such as theft since, when the defendant has an honest purpose, such a purpose provides an excuse for an act that would otherwise be deemed criminal. *Id.*, citing *Farrell v. State*, 32 Ohio St. 456 (1877). "Mistake of fact can, in an appropriate circumstance, negate either 'knowingly' or 'purposely.' " *Id.*, quoting *Snowden* at 363.

{¶ 65} Based on our analysis of the case, the trial court did not abuse its discretion in failing to instruct the jury on mistake of fact, as the evidence did not demonstrate that defendant was mistaken about any fact when he fired his gun towards a crowd of people standing down the street from his house.

4. Transferred Intent

{¶ 66} Defendant asserts the trial court erred in failing to instruct the jury regarding the doctrine of transferred intent. The doctrine of transferred intent indicates that, where an individual is attempting to harm one person and as a result accidentally

harms another, the intent to harm the first person is transferred to the second person and the individual attempting harm is held criminally liable as if he both intended to harm and did harm the same person. *State v. Mullins*, 76 Ohio App.3d 633, 636 (10th Dist.1992). Defendant testified that he did not intend to harm anyone. Accordingly, the doctrine of transferred intent was inapplicable to this case and the trial court did not err in refusing to instruct the jury regarding transferred intent.

D. *Written Jury Instructions*

{¶ 67} Defendant's ninth assignment of error states that the trial court erred when it provided the jury with redacted written copies of the court's orally delivered jury instruction. Defendant does not present an argument in his brief to support this assignment of error as required by App.R. 16(A)(7) and 12(A)(2). The trial court initially instructed the jury orally, but following a request from the jurors for a definition of the crimes charged, the court stated it would give the jury a "copy of the jury instructions on the four counts." (Tr. 1315.)

{¶ 68} Crim.R. 30(A) provides that "[t]he court shall reduce its final instructions to writing or make an audio, electronic, or other recording of those instructions, provide at least one written copy or recording of those instructions to the jury for use during deliberations, and preserve those instructions for the record." Accordingly, the trial court did not err when it reduced its final instructions to writing and provided the jury with a copy.

{¶ 69} Based on the foregoing, defendant's second, third, fourth, fifth, sixth, and ninth assignments of error are overruled.

V. EIGHTH ASSIGNMENT OF ERROR—PROSECUTORIAL MISCONDUCT

{¶ 70} Defendant's eighth assignment of error asserts the prosecutor engaged in prosecutorial misconduct during closing argument. Although defendant also notes in his brief a perceived "aura of judicial animosity toward the defense in this trial," alleging that the trial judge "closed his eyes and was incessantly 'humming' to himself during the entire trial," defendant's contentions regarding the judge's conduct do not correlate with any of defendant's assigned errors. (Appellant's brief, 29-30.) Pursuant to App.R. 12(A)(1)(b), appellate courts must "[d]etermine [an] appeal on its merits on the assignments of error set forth in the briefs under App. R. 16." Thus, appellate courts rule on assignments of

error, not mere arguments. *Thompson v. Thompson*, 196 Ohio App.3d 764, 2011-Ohio-6286, ¶ 65 (10th Dist.). Accordingly, we will not address defendant's arguments regarding the trial judge's conduct.

{¶ 71} Regarding prosecutorial misconduct, defendant asserts, citing to pages 1251 and 1256 of the transcript, that the prosecutor "usurp[ed] the court's sole function at trial by 'pre-instructing' the jury (prior to the court's own instruction), as to what law they 'would, should, could' or 'would-not, should-not, could-not' consider during their deliberations." (Appellant's brief, 32.) During closing argument, the State noted that the case did not concern "a justifiable homicide," stating: "This is not a self-defense issue. It would be in the jury instruction if it [was]. So even though there is a whole line and series of questioning about that, that's not for your consideration." (Tr. 1251.) Defendant did not object to this statement. Defense counsel noted during closing argument that defendant stepped out onto his porch and fired his weapon because "[h]e thought his family was in danger," adding: "And you know what, the law doesn't require in these cases that you be correct." (Tr. 1256.) The State objected, noting defense counsel was "arguing self-defense," and the court sustained the objection. (Tr. 1256.)

{¶ 72} When reviewing allegations of prosecutorial misconduct, the test for appellate courts is whether the prosecutor's conduct was improper and, if so, whether that conduct prejudicially affected the substantial rights of the accused. *State v. Pilgrim*, 184 Ohio App.3d 675, 2009-Ohio-5357, ¶ 57 (10th Dist.) " '[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.' " *State v. Wilkerson*, 10th Dist. No. 01AP-1127, 2002-Ohio-5416, ¶ 38, quoting *Smith v. Phillips*, 455 U.S. 209, 219 (1982). Accordingly, prosecutorial misconduct will not be grounds for reversal unless the defendant has been denied a fair trial. *State v. Maurer*, 15 Ohio St.3d 239, 266 (1984).

{¶ 73} A prosecutor is afforded wide latitude in closing argument, which must be reviewed in its entirety in order to determine whether the challenged remarks prejudiced the defendant. *State v. Hill*, 75 Ohio St.3d 195, 204 (1996). During closing argument, the State can summarize the evidence and draw conclusions as to what the evidence shows. *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, ¶ 116. Because defense counsel did not object to the prosecutor's comment during closing argument, we review for plain error,

asking whether "defendant would not have been convicted in the absence of the improper conduct." *State v. Saleh*, 10th Dist. No. 07AP-431, 2009-Ohio-1542, ¶ 68.

{¶ 74} Defendant made several comments during his testimony indicating a possible self-defense defense, noting that he "felt it was deadly force placed against me and my family," that there was "imminent danger right there," and that the individuals in his yard were "posing imminent danger with deadly force." (Tr. 1195, 1198, 1206.) Where a defendant, through his testimony, indicates a possible self-defense argument, the prosecutor is entitled to comment on such evidence during closing. *See State v. Horn*, 5th Dist. No. 2010 CA 0078, 2011-Ohio-2168, ¶ 39-43 (noting that although the defendant did not specifically raise self-defense, "because Appellant's own testimony was that he was scared and feared for his life," and that he thought the victim "was going to do something to [him]," the prosecutor's comments during closing argument "in contravention of self-defense" were not improper). Accordingly, the prosecutor's comment highlighting the absence of a self-defense instruction was not improper where defendant repeatedly tried to present a self-defense theory. Moreover, as our above analysis of the evidence indicates, defendant would have been convicted even in the absence of the prosecutor's comment.

{¶ 75} The prosecutor's comment during closing argument did not rise to the level of plain error. Defendant's eighth assignment of error is overruled.

VI. TENTH ASSIGNMENT OF ERROR—SENTENCING

{¶ 76} Defendant's tenth assignment of error asserts that the trial court erred in its imposition of sentence. Defendant contends the trial court erred "by making ORC 2929.14(E)(4) findings, both as to the consecutive gun specifications and as to imposition of consecutive sentences." (Appellant's brief, 33.) Defendant further asserts that the trial court was obligated to merge "counts and/or gun specifications," because the "State had not met its burden of establishing a second or distinctly separate gunshot wound fired from [defendant's] firearm to the body of Candace Keys and/or to the body of Teddy McGrapth." (Appellant's brief, 33.)

A. *Merger*

{¶ 77} The jury found defendant guilty for the murder of McGrapth and found defendant guilty of felonious assault and attempted murder relative to Keys. Pursuant to

the State's election, the court merged the felonious assault conviction into the attempted murder conviction. Defense counsel argued that the murder and attempted murder convictions, as well as the firearm specifications, should also merge because the bullet could have "passed through the foot of the victim, Candace Keys, and struck the pavement and ricocheted up and took the life of Mr. McGrapth." (Tr. 1341.) The court refused to merge the remaining convictions, noting that defendant's ricochet theory was "nothing more than speculation." (Tr. 1341.)

{¶ 78} R.C. 2941.25(A) provides that, where a defendant's same conduct "can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one." Where, however, "the defendant's conduct constitutes two or more offenses of dissimilar import" or "results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them." R.C. 2941.25(B). When determining whether two offenses "are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered." *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, syllabus ("*Johnson II*"). If the offenses are of similar import because the defendant committed them through the same conduct, the court then must ask whether the offenses were committed separately or with a separate animus. *Id.* at ¶ 49-51.

{¶ 79} Where a defendant harms multiple individuals through the same course of conduct, and each offense charged is defined in terms of conduct toward another, the offenses are of dissimilar import. *See State v. Jones*, 18 Ohio St.3d 116, 118 (1985) (finding the defendant could be sentenced for two counts of aggravated vehicular homicide, although both counts arose from one accident where two individuals died, because the charges were of "dissimilar import-the 'import' under R.C. 2903.06 being each person killed"); *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, ¶ 48 (noting that, as arson is defined in terms of creating a substantial risk of harm to another, the defendant "caused six offenses of dissimilar import because six different people were placed at risk" when defendant set one structure on fire); *State v. Phillips*, 8th Dist. No. 98487, 2013-Ohio-1443, ¶ 10 (noting that "by firing multiple shots at an occupied vehicle,

* * * appellant attempted to purposely cause the death of each victim" thus the "offenses at issue [were] not allied offenses of similar import"). *See also Johnson II* at ¶ 15, quoting 1973 Legislative Service Commission comments to 1972 Am.Sub.H.B. No. 511.

{¶ 80} The crimes of felony murder and attempted murder are both defined in terms of conduct towards another: they prohibit a defendant from causing or attempting to cause the death of another. Accordingly, because defendant harmed two separate individuals by his conduct, the murder and attempted murder convictions were of dissimilar import, and the trial court properly refused to merge these convictions.

{¶ 81} Defendant also contends that the trial court erred in failing to merge the firearm specifications. When an offender is convicted of a felony and a firearm specification under R.C. 2941.145, R.C. 2929.14(B)(1)(a)(ii) requires the trial court to impose a three-year prison term on the offender. R.C. 2929.14(B)(1)(b) states that "[e]xcept as provided in division (B)(1)(g) of this section, a court shall not impose more than one prison term on an offender under division (B)(1)(a) of this section for felonies committed as part of the same act or transaction." R.C. 2929.14(B)(1)(g) provides:

> If an offender is convicted of or pleads guilty to two or more felonies, if one or more of those felonies are aggravated murder, murder, attempted aggravated murder, attempted murder, aggravated robbery, felonious assault, or rape, and if the offender is convicted of or pleads guilty to a specification of the type described under division (B)(1)(a) of this section in connection with two or more of the felonies, the sentencing court shall impose on the offender the prison term specified under division (B)(1)(a) of this section for each of the two most serious specifications of which the offender is convicted or to which the offender pleads guilty and, in its discretion, also may impose on the offender the prison term specified under that division for any or all of the remaining specifications.

{¶ 82} Because defendant was sentenced for the crimes of murder and attempted murder, R.C. 2929.14(B)(1)(g) required the trial court to sentence defendant on the two most serious specifications. *See State v. Isreal*, 12th Dist. No. CA2011-11-115, 2012-Ohio-4876, ¶ 71. Accordingly, the trial court did not err in refusing to merge the firearm specifications.

B. *Consecutive Sentences*

{¶ 83} R.C. 2929.14(C)(4), effective September 30, 2011, provides:

> (4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶ 84} Passed as part of 2011 Am.Sub.H.B. No. 86 ("H.B. 86"), R.C. 2929.14(C)(4) now requires a sentencing judge to make certain findings before imposing consecutive sentences. Section 11 of H.B. 86 acknowledges that the Supreme Court of Ohio in *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856, severed the former identical statute, concluding that judicial fact-finding which increased a defendant's total punishment through consecutive sentences violated a defendant's Sixth Amendment right to trial by jury. *See id.* at ¶ 67. The Supreme Court later concluded in *State v. Hodge,* 128 Ohio St.3d 1, 2010-Ohio-6320, that its decision in *Foster* was incorrect in light of the United States Supreme Court decision in *Oregon v. Ice,* 555 U.S. 160 (2009). The *Hodge* court found that *Ice* did not revive Ohio's former consecutive-sentencing statutory provisions in R.C. 2929.14(E)(4) and 2929.41(A), which were held unconstitutional in *Foster*. The court concluded that trial court judges were "not obligated to engage in judicial fact-finding prior to imposing consecutive sentences unless the General Assembly enacts new legislation requiring that findings be made." *Hodge* at paragraph three of the syllabus.

{¶ 85} Thus, in H.B. 86, the General Assembly first repealed the former consecutive sentencing statute, R.C. 2929.14(E)(4), and then revived the requirement that trial judges make certain findings prior to imposing consecutive sentences in R.C. 2929.14(C)(4). *See* Sections 2, 11, and 12 of H.B. 86. H.B. 86 applies here because the court sentenced defendant on October 4, 2011, four days after the effective date of H.B. 86. *See State v. Wilson*, 10th Dist. No. 12AP-551, 2013-Ohio-1520, ¶ 17; *State v. Schirmer*, 2d Dist. No. 25147, 2012-Ohio-5543, ¶ 10 (noting that H.B. 86 applied to defendant "because he was sentenced after its effective date").

{¶ 86} R.C. 2929.14(C)(4) now requires the trial court to make three findings before imposing consecutive sentences: (1) that consecutive sentences are necessary to protect the public from the future crime or to punish the offender; (2) that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public; and (3) that one of the subsections (a), (b), or (c) apply. *See State v. Farnsworth*, 7th Dist. No. 12 CO 10, 2013-Ohio-1275, ¶ 8. The trial court is not required to give reasons explaining these findings, nor is the court required to recite any "magic" or "talismanic" words when imposing consecutive sentences. *Id.*, citing *State v. Frasca*, 11th Dist. No. 2011-T-0108, 2012-Ohio-3746, ¶ 57; *State v. Murrin*, 8th Dist. No. 83714, 2004-Ohio-3962, ¶ 12. Nevertheless, the record must reflect that the court made the findings required by the statute. *Id.*

{¶ 87} The trial court did not make any of the findings required by R.C. 2929.14(C)(4) before imposing consecutive sentences. The court simply announced the sentence, stating that defendant would serve all of the terms consecutively, "making the total sentence 28-years-to-life." (Tr. 1350.) Because the trial court failed to comply with R.C. 2929.14(C)(4), by failing to make any of the required findings on the record before imposing consecutive sentences, we must vacate defendant's sentence and remand the case for resentencing. *See State v. Smith*, 8th Dist. No. 98280, 2013-Ohio-576, ¶ 74 (trial court properly vacated the defendant's sentence and remanded for resentencing where the trial court "failed to comply with the mandate of H.B. 86 before imposing consecutive sentences," because the trial court "failed to make a single finding on the record" merely stating "the term of the sentence on the record"); *Farnsworth* at ¶ 10.

{¶ 88} Based on the foregoing, defendant's tenth assignment of error is overruled as it relates to merger, but sustained as it relates to the imposition of consecutive sentences.

VII. CONCLUSION

{¶ 89} Having overruled defendant's first, second, third, fourth, fifth, sixth, seventh, eighth, and ninth assignments of error, but having overruled in part and sustained in part defendant's tenth assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas in part, but vacate defendant's sentence and remand the case for resentencing. On remand, the trial court must determine whether consecutive sentences are appropriate under R.C. 2929.14(C)(4) and enter the proper findings on the record.

Judgment affirmed in part
and reversed in part;
cause remanded.

KLATT, P.J, and DORRIAN, J., concur.
