[Cite as *State v. Lindsey*, 2015-Ohio-2169.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 14AP-751 (C.P.C. No. 13CR-1201)
v.	:	(REGULAR CALENDAR)
Robert L. Lindsey, IV,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 4, 2015

Ron O'Brien, Prosecuting Attorney, and *Valerie Swanson*, for appellee.

Blaise G. Baker, for appellant.

APPEAL from the Franklin County Court of Common Pleas

LUPER SCHUSTER, J.

{¶ 1} Defendant-appellant, Robert L. Lindsey, IV, appeals from a judgment entry of the Franklin County Court of Common Pleas finding him guilty, pursuant to jury verdict, of one count of murder and one count of felony murder. For the following reasons, we affirm.

I. Facts and Procedural History

{¶ 2} By indictment filed April 5, 2013, plaintiff-appellee, the State of Ohio, charged Lindsey with one count of aggravated murder, in violation of R.C. 2903.01, an unclassified felony; one count of murder, in violation of R.C. 2903.02, an unclassified felony; and one count of felony murder, in violation of R.C. 2903.02, an unclassified felony. All three charges related to the stabbing death of Latonia Banner, Lindsey's mother, on February 20, 2013. Lindsey entered a plea of not guilty to all charges.

{¶ 3} At a jury trial commencing July 7, 2014, the state presented the testimony of Officer Dana Houseberg, a patrol officer with the Columbus Division of Police. Officer Houseberg testified that on February 20, 2013, she was working patrol when she responded to a dispatch of a stabbing at 3856 Chestnut Ridge Loop. When she arrived at the scene, Officer Houseberg met Officer Steve Simmons who was waiting at the front door of the apartment. Lindsey was lying down on the stoop in front of the door applying pressure to a wound on his leg and wearing a homemade tourniquet. Officer Houseberg described Lindsey as "pretty upset about the wound to his leg" and yelling out that he was in pain. (Tr. Vol. I, 59.) Because Lindsey had a wound to his leg, Officer Houseberg and her partner picked Lindsey up and carried him to the nearby medic. While she was carrying Lindsey, Officer Houseberg said she asked Lindsey what happened, and Lindsey told her that "him and his mother got into an argument and that he didn't do anything to her." (Tr. Vol. I, 52.)

{¶ 4} Upon entering the residence, the officers observed some blood downstairs and eventually found Banner upstairs lying facedown in one of the bedrooms. The officers ordered Banner to show her hands but quickly realized she was unresponsive, and they noticed there was quite a bit of blood on the ground around her body. Officer Houseberg thought she could detect "a very, very slight" pulse, but the medics ultimately pronounced Banner dead at the scene. (Tr. Vol. I, 55.) While securing the scene, Officer Houseberg observed two knives in the room where she found Banner: one near Banner and another broken knife between Banner and the bedroom door.

{¶ 5} Philip Walden, a now-retired officer with the Columbus Division of Police's crime scene search unit, testified that he responded to the scene at 3856 Chestnut Ridge Loop with his partner, Detective Kevin Myers in response to a dispatch to assist homicide detectives. At trial, Walden identified many photographs taken at the scene. By the time Walden arrived at the scene, Banner was lying on her back with her faceup. Walden identified photographs of three different knives found in the room where Banner's body was: one near Banner's body that had visible blood on it, one broken knife near the bedroom door that did not have any visible blood on it, and one that had been found underneath a pillow on the bed with no visible blood. Additionally, Walden identified

photographs of blood swabs collected at the scene that were ultimately sent for laboratory testing.

{¶ 6} Detective Robert J. Connor, Jr., a homicide detective with the Columbus Division of Police, testified that he responded to the scene of Banner's death and that someone other than Banner had called 911. After completing his duties at the scene, Detective Connor returned to police headquarters where he interviewed Lindsey. As is standard procedure, the interview was video recorded, and the state played the video of Lindsey's interview with Detective Connor in court for the jury. During the interview, Lindsey told Detective Connor he was 19 years old and currently a senior at New Albany High School. Almost immediately, Lindsey told the detectives that he "never thought that [his mother] would actually stab [him]," but that "she's done it before * * * with a fork" when he was 14 years old. (Tr. Vol. II, 144.) He then told the detectives that his mother had "done a lot things that made [him] feel uncomfortable in that house," such as taking out a life insurance policy on Lindsey without his consent. (Tr. Vol. II, 144.)

{¶ 7} Turning to the events leading up to the stabbing, Lindsey told detectives he returned from school and his mother could not find her phone, so he let her borrow his phone. According to Lindsey, Banner saw some text messages on his phone that "made her upset," and Lindsey reacted by calling his mother an "idiot." (Tr. Vol. II, 146.) He then went into his bedroom and closed the door. Lindsey said his mother came to his bedroom door and said "if you don't open up this door, all hell is going to break loose." (Tr. Vol. II, 147.) When his mother came into his room, Lindsey told detectives she was holding two knives in her hands. He then told detectives he sleeps with a kitchen knife under his pillow, but that was not one of the knives used in the altercation. Lindsey said his mother threw one of the knives at him causing the knife to break, and she then stabbed him in the leg with the remaining knife. He also told the detectives that when they would argue his mother would tell him that she wished he was dead. He then described a previous incident in which he said his mother slammed him down on the ground, wrapped up a cable coming from his television and used it to beat him.

{¶ 8} During the interview, Lindsey told detectives that his mother slammed him to the ground and the two of them were wrestling. He said while they were wrestling, he took the knife away from his mother and stabbed her "[m]aybe once or twice." (Tr. Vol.

II, 154.) Right after he stabbed his mother, Lindsey said he got up and went downstairs but soon realized he could not find his phone to call for help. He eventually retrieved his cell phone from his mother's bedroom and called 911, and he then used his belt and a kitchen rag to try to stop the bleeding from his leg. Lindsey said the whole incident happened very fast, but he thought his mother was lying on her back when he ran out of the room. When he went back upstairs to find his cell phone, he said he "didn't even go close to" his mother to check on her. (Tr. Vol. II, 164.) He said he "didn't have any choice" but to defend himself after his mother tried to stab him with the first knife and it broke and then she came after him again with the second knife. (Tr. Vol. II, 158.) When asked if he remembered where he stabbed his mother, he indicated that he thought he stabbed her on the side, but he could not remember if it was the left side or the right side. Lindsey told detectives he is left-handed and thought he used his left hand to stab his mother.

{¶ 9} Lindsey eventually asked the detectives whether there would be any way for him to "press charges for what happened tonight." (Tr. Vol. II, 183.) He told the detectives that everything he told them regarding past violence from his mother "has been documented." (Tr. Vol. II, 185.) The detectives then told Lindsey that his mother did not survive her injuries, to which Lindsey responded he did not "even know what to think" and "it's not like [he] wanted to" do this. (Tr. Vol. II, 196.) When the detectives told him he was going to be arrested, Lindsey responded, "[a]rrested? For what? I didn't even do anything." (Tr. Vol. II, 197.) He then said "it's not my fault that she died from her wounds." (Tr. Vol. II, 197.) Before the detectives left the room, Lindsey asked them "[d]o you know when I would be able to get my cell phone back if I ever do get out so I can make a few phone calls? * * * That's all I really need." (Tr. Vol. II, 200.) The detectives left the room, and Lindsey asked a different officer whether anyone would be notified that he had been arrested because he would "prefer to leave [his] school out of it" and he "can't have that hanging over [his] head when [he goes] back to school." (Tr. Vol. II, 202.)

{¶ 10} After the video concluded, Detective Connor explained that he obtained a search warrant for the contents of Lindsey's phone and he described the text messages he located on it. From the afternoon of February 20, 2013 starting at 12:20 p.m., there were three outgoing messages sent from Lindsey's phone to the same number within a span of

two minutes. The first message said "I want to fuck you?"; the second message said "What say you?"; and the third message said "I have a really good view of you right now." A reply then came at 12:23 p.m. that said "Who is this..." (Tr. Vol. II, 213.)

{¶ 11} Detective Connor said that, based on his 14 years of experience as a homicide detective, it is fairly common for knives to be involved as weapons, but that he cannot "remember one occurrence of a suspect or anyone wielding two knives to try to stab someone." (Tr. Vol. II, 215.) He also said that in his experience, it is common for the attacker in a stabbing to have injuries and knife wounds on him. Regarding the stab wound on Lindsey's leg, Detective Connor said the wound was consistent with a wound a victim might receive when stabbed, but that it was also possible that the wound was consistent with a self-inflicted wound during a knife attack.

{¶ 12} J. Scott Somerset, M.D., deputy coroner with the Franklin County Coroner's Office, testified that he performed an autopsy on Banner on February 21, 2013. Dr. Somerset identified seven stab wounds on Banner's body, defining a stab wound as a wound that is deeper into the body than it is long across the skin. Explaining Banner's injuries, Dr. Somerset grouped together four similar stab wounds on the back of Banner's neck. These wounds did not hit bone or anything vital. Dr. Somerset testified these four wounds were consistent with someone stabbing Banner from behind, and if they were inflicted from behind, the person wielding the knife would have been using his left hand. None of these four wounds was the fatal wound.

{¶ 13} Dr. Somerset next described a wound located in the middle of Banner's upper back that went five inches deep. Dr. Somerset described this wound as a "substantial wound" that passed into the muscles of the back and cut one of the muscles that helps raise the scapula. (Tr. Vol. II, 271.) Because this wound eventually hit bone, Dr. Somerset said it was possible that the infliction of this wound could have damaged the instrument used in the stabbing. This wound was consistent with the victim being facedown and the assailant being on top of her using a knife to stab her.

{¶ 14} The next wound Dr. Somerset described was located on Banner's left side between her ribs, penetrating the lower lobe of her left lung. The wound was one-and-one-fourth inches in length, but Dr. Somerset did not record an exact depth because it entered the body cavity which makes it so a depth measurement is difficult to discern. In

order to get in between the victim's ribs, however, the knife had to penetrate at least one or two inches. This wound caused one-half liter of blood to pool in the left chest cavity and caused Banner's lung to collapse. Dr. Somerset testified that this was the fatal wound. This wound was also consistent with the victim being facedown and the assailant being on top of her using a knife to stab her.

{¶ 15} Banner also had an additional wound that Dr. Somerset described as irregular because it went under the skin and then exited the skin a short distance away from the entrance point. While the other wounds were sharp and straight, this one was not straight and was consistent with being inflicted by a sharp instrument that had been bent.

{¶ 16} Dr. Somerset then described several incised wounds, meaning wounds that were longer than they were deep into the victim's body. These wounds were located on Banner's left jaw line, her left thumb, and her lateral right wrist. Banner also had scrapes and abrasions on various parts of her body, including her front right shoulder, her back right arm, and her left wrist. After examining all of Banner's injuries, Dr. Somerset determined that Banner's death was a homicide. He agreed that given their locations, some of the wounds could be described as defensive wounds.

{¶ 17} The state then called M.G., a 17-year-old student who rode the same school bus as Lindsey around the time of February 20, 2013. M.G. testified she was friends with Lindsey and would frequently sit next to him on the bus. M.G. said Lindsey used to argue with his mother "a lot," and "he had mentioned before that he would be angry at his mom and he'd make statements that he said he was going to kill her." (Tr. Vol. III, 318.) When asked how she knew that Lindsey would argue with his mother, M.G. said Lindsey "would get on the bus and he'd be upset and just angry," and he would tell M.G. that he had just had an argument with his mother. (Tr. Vol. III, 319.) She described the arguments as being over "normal stuff," meaning his mother would tell him he could not go somewhere or that he had not done the things he was supposed to do around the house. (Tr. Vol. III, 319.) M.G. said Lindsey "would get pretty worked up about it, just that he hated his mom, he couldn't wait to get out of the house." (Tr. Vol. III, 319-20.) According to M.G., Lindsey would have these arguments with his mother once or twice a week.

{¶ 18} M.G. testified she heard Lindsey say more than ten times that he wanted to kill his mother. The last time she heard him say he hated his mother and wanted to kill her was a week or two before she died.

{¶ 19} M.G. then testified that she heard Lindsey ask another "guy on the bus if he could get him a gun for protection." (Tr. Vol. III, 324.) She said she heard Lindsey inquire about getting a gun more than five times. M.G. did not ever hear Lindsey say from whom he needed protection.

{¶ 20} Lindsey testified in his own defense. He described the "house rules" his mother expected him to follow, including not bringing anything into the house or taking it out without her permission, not talking to anyone without her permission, no locked doors, and no closed doors. Lindsey said those rules were "not to be broken," and his consequence for violating the rules would range from a beating to being thrown outside or denied food. (Tr. Vol. III, 356.) Referencing statements he made during his police interview, Lindsey said his mother had stabbed him once before on his left arm. He said he never reported this abuse because he was embarrassed.

{¶ 21} Though Lindsey remembered having phone conversations with his mother while he was riding the school bus, he did not remember ever making a statement that he wanted to kill his mother. He agreed, however, that he would get "frustrated" when he would speak to his mother. (Tr. Vol. III, 359.) Lindsey did not remember discussing trying to obtain a gun from a student or anyone else.

{¶ 22} Turning to the events of February 20, 2013, Lindsey said that when he came home from school, he went upstairs to his bedroom and then his mother asked him to look for her cell phone. When he couldn't find the phone, he said his mother asked to use his cell phone, so he gave it to her and walked back to his room. Two or three minutes later, Banner called Lindsey back to her room. When Lindsey returned to her room, Banner was "pretty upset" because "she had seen text messages on [his] phone that she didn't approve of." (Tr. Vol. III, 365.) The text message was "inappropriate" and said something about Lindsey wanting "to fuck this girl," which Lindsey said was a violation of the house rule prohibiting Lindsey from talking to anyone without permission. (Tr. Vol. III, 365.)

{¶ 23} Lindsey described his mother as being "pretty pissed," and when his mother threw something toward him while "screaming and yelling," Lindsey said he walked back to his room and closed the door. (Tr. Vol. III, 366-67.) He said he did not lock his bedroom door, though, because that would have been a violation of another house rule.

{¶ 24} A few seconds later, Lindsey said his mother came into his room holding two knives. He said his mother charged him and he lost his balance. Lindsey testified that his mother "slammed [him] down, [he] was on the ground, and she swung one of the knives and it snapped and broke." (Tr. Vol. III, 371.) Lindsey said the two of them were wrestling back and forth and that his mother eventually stabbed him in the leg with the other knife while he was lying on his back. He said he "just knew after she had stabbed [him] the first time that she wasn't stopping" and that he "knew she was going to kill [him]." (Tr. Vol. III, 372-73.)

{¶ 25} Lindsey testified he was able to grab the knife away from his mother, and he stabbed her. When he stabbed her, he said he was lying on his side on the floor. After he stabbed her, he said he "exited the room" and "just tried to get away as quickly as possible out of that room." (Tr. Vol. III, 374.) Lindsey said he could not remember how many times he stabbed his mother because the whole incident "was pretty quick." (Tr. Vol. III, 375.)

{¶ 26} When he walked away from his mother, Lindsey said he went downstairs and made a tourniquet out of his belt and a rag. At some point, he had to go back upstairs to get his cell phone in order to call 911, and when he went back upstairs, he said he did not go back into his bedroom to check on his mother because he "didn't know if she was going to come back out and kick [him] or anything like that." (Tr. Vol. III, 379.) He said he thought his mother was still alive when he left his bedroom. After he called 911, Lindsey said he exited the house and laid on the front stoop.

{¶ 27} When the police officers arrived, Lindsey recalled telling them that he "didn't do anything," but he said he intended that comment to convey that he did not attack his mother first and that his mother had tried to kill him. (Tr. Vol. III, 381.) Lindsey testified he did not plan to kill his mother that day, and that he only acted the way he did because he thought his mother was going to kill him.

{¶ 28} On cross-examination, Lindsey agreed that he used his cell phone to call a lot of people and send a lot of text messages even though one of his "house rules" was not to talk to anyone without his mother's permission. Lindsey said he had photographs documenting his mother's abuse, but he did not know where the photographs were located. Lindsey agreed that after he gained control of the knife, he could have left the room with the weapon without stabbing his mother, but he said he did not know whether the knives he saw were the only weapons his mother had with her. He testified that he thought his mother was still alive even when the detectives were interviewing him at police headquarters. Lindsey said he was scared of his mother that night, but he still went back upstairs to get his cell phone. He said he thought his mother was still "coming back for" him after he left his bedroom. (Tr. Vol. III, 448.) Lindsey also testified that even though he was afraid of his mother and thought she was going to kill him, he dropped the knife that he had used to stab her in his bedroom and left it there with his mother.

{¶ 29} Following deliberations, the jury returned guilty verdicts as to Counts 2 and 3 of the indictment, murder and felony murder, and a not guilty verdict as to Count 1 of the indictment, aggravated murder. At a September 3, 2014 sentencing hearing, the trial court imposed a sentence of 15 years to life imprisonment on Count 2 and found that, for purposes of sentencing, Count 3 merged with Count 2. The trial court journalized Lindsey's convictions and sentence in a September 5, 2014 judgment entry. Lindsey timely appeals.

II. Assignments of Error

{¶ 30} Lindsey assigns the following errors for our review:

> [1.] The trial court violated Defendant-Appellant's rights to due process and a fair trial when in the absence of sufficient evidence the trial court found Defendant-Appellant guilty of murder.
>
> [2.] The trial court violated Defendant-Appellant's rights to due process and a fair trial when he was convicted of murder against the manifest weight of the evidence.
>
> [3.] The trial court erred when it denied the Defendant-Appellant's request for a charge to the jury on the lesser offense of voluntary manslaughter.

> [4.] The trial court committed reversible error when it allowed the Plaintiff-Appellee to produce hearsay testimony.

III. First Assignment of Error – Sufficiency of the Evidence

{¶ 31} In his first assignment of error, Lindsey argues his convictions for murder and felony murder were not supported by sufficient evidence. More specifically, Lindsey asserts the state failed to present evidence that he acted purposely and with the specific intention to cause the death of his mother.

{¶ 32} Whether there is legally sufficient evidence 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 relevant inquiry for an appellate court is whether the evidence presented, when viewed in a light most favorable to the prosecution, would allow any rational trier of fact to find the essential elements of the crime proven beyond a reasonable doubt. *State v. Mahone*, 10th Dist. No. 12AP-545, 2014-Ohio-1251, ¶ 38, citing *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, ¶ 37.

{¶ 33} In order to convict a defendant of murder in violation of R.C. 2903.02(A), the state must prove the defendant purposefully caused the victim's death. "A person acts purposely when it is the person's specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is the offender's specific intention to engage in conduct of that nature." R.C. 2901.22(A).

{¶ 34} There is no dispute that Lindsey inflicted the stab wounds that killed his mother. The remaining issue is whether the state submitted sufficient evidence that Lindsey acted "purposely."

{¶ 35} "[T]he law has long recognized that intent, lying as it does within the privacy of a person's own thoughts, is not susceptible of objective proof." *State v. Garner*, 74 Ohio St.3d 49, 60 (1995), citing *State v. Carter*, 72 Ohio St.3d 545, 554 (1995). Intent to kill "may be deduced from all the surrounding circumstances, including the instrument used to produce death, its tendency to destroy life if designed for that purpose, and the manner of inflicting a fatal wound." *State v. Robinson*, 161 Ohio St. 213 (1954), paragraph five of the syllabus; *see also State v. Eley*, 77 Ohio St.3d 174, 180 (1996).

{¶ 36} Here, the evidence from the coroner indicated Lindsey stabbed Banner a total of seven times, including four stab wounds to her neck; a wound so deep and requiring so much force that it likely caused the knife to bend; and a stab wound through Banner's ribs and into her lung, causing the lung to collapse. Banner also had several incisive and defensive wounds. The number and location of wounds and the manner in which they were inflicted was sufficient evidence for a jury to conclude Lindsey acted purposely to kill Banner. *State v. Scudder*, 71 Ohio St.3d 263, 274 (1994) (stating "the number and nature of [the victim's] stab wounds clearly established [the defendant's] purpose to kill").

{¶ 37} To the extent Lindsey raises self-defense in his challenge to the sufficiency of the evidence, his argument is misplaced. Self-defense is an affirmative defense under Ohio law. *State v. Calderon*, 10th Dist. No. 05AP-1151, 2007-Ohio-377, ¶ 30, citing *State v. Williford*, 49 Ohio St.3d 247, 249 (1990). The " 'due process "sufficient evidence" guarantee does not implicate affirmative defenses, because proof supportive of an affirmative defense cannot detract from proof beyond a reasonable doubt that the accused had committed the requisite elements of the crime.' " *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶ 37, quoting *Caldwell v. Russell*, 181 F.3d 731 (6th Cir.1999), abrogated by statute on other grounds. Thus, we address Lindsey's self-defense contentions in our analysis of the manifest weight of the evidence.

{¶ 38} In view of the testimony concerning the cause of Banner's wounds and death, and the state's evidence allowing the jury to conclude the wounds were inflicted with the purpose to kill, the record contains sufficient evidence to support the jury's verdict that Lindsey committed murder in violation of R.C. 2903.02. Accordingly, we overrule Lindsey's first assignment of error.

IV. Second Assignment of Error – Manifest Weight of the Evidence

{¶ 39} In his second assignment of error, Lindsey argues his convictions were against the manifest weight of the evidence. Lindsey challenges the weight of the evidence with respect to the elements of the offenses and with respect to the jury's determination that he did not establish the affirmative defense of self-defense.

{¶ 40} When presented with a manifest weight argument, an appellate court engages in a limited weighing of the evidence to determine whether sufficient competent,

credible evidence supports the jury's verdict. *State v. Salinas*, 10th Dist. No. 09AP-1201, 2010-Ohio-4738, ¶ 32, citing *Thompkins* at 387. "When 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." *Thompkins* at 387, quoting *Tibbs v. Florida*, 457 U.S. 31, 42 (1982). Determinations of credibility and weight of the testimony are primarily for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. Thus, the jury may take note of the 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).

{¶ 41} An appellate court considering a manifest weight challenge "may not merely substitute its view for that of the trier of fact, but must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, 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. Harris*, 10th Dist. No. 13AP-770, 2014-Ohio-2501, ¶ 22, citing *Thompkins* at 387. Appellate courts should reverse a conviction as being against the manifest weight of the evidence in only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983).

A. Purpose and Specific Intention

{¶ 42} Lindsey first argues the jury lost its way when it determined he acted purposely and with the specific intention to cause the death of his mother, restating much of his argument regarding sufficiency of the evidence. More specifically, Lindsey asserts that his statements to detectives and his testimony that he only stabbed his mother as the result of a struggle indicates he lacked the requisite purpose to cause her death.

{¶ 43} Initially, we note that the presence of conflicting testimony does not render a verdict against the manifest weight of the evidence. *Raver* at ¶ 21. Additionally, Lindsey's argument presupposes the jury found him to be a credible witness and believed his version of events. However, a conviction is not against the manifest weight of the evidence because the trier of fact believed the state's version of events over the

defendant's version. *State v. Gale*, 10th Dist. No. 05AP-708, 2006-Ohio-1523, ¶ 19. As we noted above, the jury remains free to believe "all, part, or none of a witness's testimony." *Raver* at ¶ 21. Given that the deputy coroner's description of the nature of Banner's wounds suggested many of the stab wounds were inflicted from behind, the jury did not clearly lose its way in disbelieving Lindsey's testimony. Further, M.G.'s testimony that she heard Lindsey say he hated his mother and wanted to kill her adds additional support to the jury's determination that Lindsey acted purposely. Thus, in light of the evidence discussed above, as well as the record in its entirety, we do not find the jury clearly lost its way in concluding Lindsey acted purposely to cause the death of his mother when he stabbed her seven times. The only evidence to the contrary was Lindsey's own self-serving testimony, and we agree with the jury's decision to discount that testimony in favor of ample other evidence at trial.

B. Self-Defense

{¶ 44} Lindsey next argues the jury clearly lost its way when it determined Lindsey did not establish self-defense. "Self-defense is an affirmative defense, and the burden of going forward with the evidence of self-defense, as well as the burden of proof for demonstrating self-defense, rests with the accused." *State v. Rankin*, 10th Dist. No. 10AP-1118, 2011-Ohio-5131, ¶ 24, citing *State v. Palmer*, 80 Ohio St.3d 543 (1997); R.C. 2901.05(A).

{¶ 45} A defendant must prove self-defense by a preponderance of the evidence. *State v. Martin*, 21 Ohio St.3d 91, 93 (1986). To establish self-defense, a defendant must prove: (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 his only means of escape was the use of such force, and (3) he did not violate 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 use only 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, and "[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.) *Jackson* at 284.

{¶ 46} To establish his claim of self-defense, Lindsey relies on his own trial testimony. Lindsey testified that his mother came into his bedroom wielding two knives, charged at him, and slammed him to the ground before stabbing him in the leg. After wrestling with his mother, Lindsey said he was able to obtain the knife from his mother and stab her before leaving the bedroom almost immediately.

{¶ 47} The state's evidence undermined Lindsey's version of events. When Officer Houseberg arrived at the scene, she testified that Lindsey told her that he "didn't do anything to her." (Tr. Vol I, 52.) Despite claiming to be afraid that his mother might still come after him, Lindsey agreed that he left the knife in the room with his mother and returned upstairs to retrieve his cell phone instead of immediately fleeing the apartment. Lindsey also agreed that once he gained control of the knife, he could have left the room instead of stabbing his mother. Moreover, the deputy coroner testified that most of Banner's stab wounds were on her back consistent with someone attacking her from behind. Detective Connor testified that Lindsey's stab wound could have been consistent with a self-inflicted wound sustained during a knife attack. Similarly, the seven stab wounds inflicted on Banner " 'undercuts a claim of self-defense.' " *Rankin* at ¶ 26, quoting *State v. Hall*, 10th Dist. No. 04AP-17, 2005-Ohio-335, ¶ 40 (noting the number of gunshots fired at the victim undercuts a claim of self-defense), *rev'd on other grounds*, *In re Ohio Criminal Sentencing Statutes Cases*, 109 Ohio St.3d 313, 2006-Ohio-2109.

{¶ 48} Even if the jury were to believe portions of Lindsey's testimony that there was a struggle with his mother for the knife, a defendant claiming self-defense is privileged to "only use as much force as is reasonably necessary to repel the attack." *State v. Vasquez*, 10th Dist. No. 13AP-366, 2014-Ohio-224, ¶ 53, citing *Harrison* at ¶ 25. Here, although Lindsey told detectives he only stabbed his mother once or twice, he actually stabbed her seven times and inflicted other incisive wounds on her body. The deputy coroner also testified Banner had defensive wounds. Additionally, even by Lindsey's own testimony, once he had gained control of the knife from his mother, he could have left the room without stabbing her.

{¶ 49} Given the conflicting testimony presented, we cannot say the jury clearly lost its way and created a manifest miscarriage of justice in determining Lindsey did not act in self-defense. The jury disbelieved Lindsey's version of events and believed the

version of events presented by the state, and such a decision was within the province of the jury as the trier of fact. Accordingly, Lindsey's convictions are not against the manifest weight of the evidence, and we overrule Lindsey's second assignment of error.

V. Third Assignment of Error – Jury Instruction

{¶ 50} In his third assignment of error, Lindsey argues the trial court erred when it failed to instruct the jury on the lesser offense of voluntary manslaughter.

{¶ 51} In reviewing a trial court's jury instructions, an appellate court must determine whether the trial court's refusal to give a requested instruction was an abuse of discretion under the facts and circumstances of the case. *State v. Gover*, 10th Dist. No. 05AP-1034, 2006-Ohio-4338, ¶ 22, citing *State v. Wolons*, 44 Ohio St.3d 64, 68 (1989). An abuse of discretion implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 52} "The court must give all instructions that are relevant and necessary for the jury to weigh the evidence and discharge its duty as the factfinder." *State v. Joy*, 74 Ohio St.3d 178, 181 (1995), citing *State v. Comen*, 50 Ohio St.3d 206 (1990), paragraph two of the syllabus. Conversely, "[i]t is well established that the trial court will not instruct the jury where there is no evidence to support an issue." *Murphy v. Carrollton Mfg. Co.*, 61 Ohio St.3d 585, 591 (1991), citing *Riley v. Cincinnati*, 46 Ohio St.2d 287 (1976). Thus, in reviewing a record to determine whether there is sufficient evidence to support the giving of an instruction, "an appellate court should determine whether the record contains evidence from which reasonable minds might reach the conclusion sought by the instruction." *Id.* at 591, citing *Feterle v. Huettner*, 28 Ohio St.2d 54 (1971).

{¶ 53} Murder, as defined in R.C. 2903.02(A), provides in part "[n]o person shall purposely cause the death of another." Felony murder, as defined in R.C. 2903.02(B), provides "[n]o person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of [R.C. 2903.03 or 2903.04]."

{¶ 54} R.C. 2903.03(A), Ohio's voluntary manslaughter statute, provides "[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." Voluntary manslaughter is an inferior degree of murder because " ' "its elements are * * * contained within the indicted offense, except for one or more additional mitigating elements." ' " *State v. Shane*, 63 Ohio St.3d 630, 632 (1992), quoting *State v. Tyler*, 50 Ohio St.3d 24, 36 (1990), *superseded on other grounds by constitutional amendment*, quoting *State v. Deem*, 40 Ohio St.3d 205, 209 (1988). "Our criminal law recognizes that the provoked defendant is less worthy of blame than the unprovoked defendant, but the law is unwilling to allow the provoked defendant to totally escape punishment," as opposed to a killing in self-defense. *Id*. at 635.

{¶ 55} "Even though voluntary manslaughter is not a lesser-included offense of murder, the test for whether a judge should give a jury instruction on voluntary manslaughter when a defendant is charged with murder is the same test to be applied as when an instruction on a lesser-included offense is sought." *State v. Rahe*, 10th Dist. No. 06AP-997, 2007-Ohio-5864, ¶ 19, citing *Shane* at 632. Thus, when the evidence presented at trial would reasonably support both an acquittal on the charged crime of murder and a conviction for voluntary manslaughter, a defendant charged with murder is entitled to an instruction on voluntary manslaughter. *Id*., citing *Shane* at 632.

{¶ 56} "Before giving a jury instruction on voluntary manslaughter in a murder case, the trial judge must determine whether evidence of reasonably sufficient provocation occasioned by the victim has been presented to warrant such an instruction." *Shane* at paragraph one of the syllabus. "The trial judge is required to decide this issue as a matter of law, in view of the specific facts of the individual case. The trial judge should evaluate the evidence in the light most favorable to the defendant, without weighing the persuasiveness of the evidence." *Id*. at 637, citing *State v. Wilkins*, 64 Ohio St.2d 382, 388 (1980). "An inquiry into the mitigating circumstances of provocation must be broken down into both objective and subjective components." *Id*. at 634.

{¶ 57} The court must first apply an objective standard to determine whether provocation was reasonably sufficient to induce sudden passion or sudden fit of rage. *Rahe* at ¶ 21, citing *Shane* at 634. " 'For provocation to be reasonably sufficient, it must be sufficient to arouse the passions of an ordinary person beyond the power of his or her control.' " *Id*., quoting *Shane* at 635. The standard of what constitutes adequate provocation is "that provocation which would cause a reasonable person to act out of

passion rather than reason." *Shane* at 634, fn. 2. When insufficient evidence of provocation is presented, such that no reasonable jury would conclude that an actor was reasonably provoked by the victim, "the trial judge must, as a matter of law, refuse to give a voluntary manslaughter instruction." *Id*. at 634. The subjective component of the analysis then requires an assessment of " 'whether this actor, in this particular case, actually was under the influence of sudden passion or in a sudden fit of rage.' " *Rahe* at ¶ 21, quoting *Shane* at 634. " 'Fear alone is insufficient to demonstrate the kind of emotional state necessary to constitute sudden passion or fit of rage.' " *Id*., quoting *State v. Mack*, 82 Ohio St.3d 198, 201 (1998).

{¶ 58} Here, there is no evidence in the record that Lindsey acted under a sudden passion or fit of rage. During his statement to the detectives taken the day his mother died and his testimony at trial, Lindsey never mentioned that he was so provoked or enraged by his mother that he could not control himself and retaliated. Instead, he repeated his story that he acted in self-defense and repeatedly stated he was afraid or that he feared for his life. " '[T]his court has held that evidence supporting the privilege of self-defense, i.e., that the defendant feared for his own and other's personal safety, does not constitute sudden passion or fit of rage as contemplated by the voluntary manslaughter statute.' " *State v. Bridgewater*, 10th Dist. No. 07AP-535, 2008-Ohio-466, ¶ 28, quoting *State v. Harris*, 129 Ohio App.3d 527, 535 (10th Dist.1998), citing *State v. Tantarelli*, 10th Dist. No. 94APA11-1618 (May 23, 1995). Under the facts presented at trial, an instruction on voluntary manslaughter would have been inconsistent with Lindsey's theory of self-defense.

{¶ 59} Because there was no evidence at trial to support an instruction on the inferior offense of voluntary manslaughter, the trial court did not abuse its discretion in failing to provide the jury with an instruction on voluntary manslaughter. We overrule Lindsey's third assignment of error.

VI. Fourth Assignment of Error – Hearsay Testimony

{¶ 60} In his fourth and final assignment of error, Lindsey argues the trial court erred when it allowed the state to produce hearsay testimony. More specifically, Lindsey asserts that M.G.'s testimony at trial regarding conversations she overheard on the school bus was impermissible hearsay. Generally, the admission or exclusion of evidence lies in

the sound discretion of the trial court. *State v. Darazim*, 10th Dist. No. 14AP-203, 2014-Ohio-5304, ¶ 33, citing *State v. Bartolomeo*, 10th Dist. No. 08AP-969, 2009-Ohio-3086, ¶ 24.

{¶ 61} A statement is impermissible hearsay when it is an out-of-court statement offered for the truth of the matter asserted. Evid.R. 801(C) and 802. However, pursuant to Evid.R. 801(D)(2), a statement is not hearsay if "[t]he statement is offered against a party and is * * * the party's own statement." The statements Lindsey cites are statements that Lindsey made in M.G.'s presence, and the state used those statements against Lindsey pursuant to Evid.R. 801(D)(2). Thus, under the hearsay rule itself, M.G.'s testimony of Lindsey's statements made on the school bus admitted under Evid.R. 801(D)(2) does not constitute hearsay. *State v. Ingram*, 10th Dist. No. 06AP-984, 2007-Ohio-7136, ¶ 55. Lindsey has failed to establish that the trial court abused its discretion in allowing M.G.'s testimony, and we overrule Lindsey's fourth and final assignment of error.

VII. Disposition

{¶ 62} Based on the forgoing reasons, the sufficiency of the evidence and the manifest weight of the evidence support Lindsey's convictions. Additionally, the trial court did not err when it did not instruct the jury on the lesser offense of voluntary manslaughter, nor did it err in its evidentiary rulings. Having overruled Lindsey's four assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK and DORRIAN, JJ., concur.